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In The

Supreme Court of the United States

JEFFERSON COUNTY RACING ASSOCIATION, INC., D/B/A THE BIRMINGHAM RACE COURSE,

Petitioner,

v.

DAVID BARBER, IN HIS CAPACITY AS DISTRICT ATTORNEY OF JEFFERSON COUNTY, ALABAMA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether a candidate for state judicial office exercising the First Amendment freedom of speech right to present his or her opinion on legal and political issues to voters, as recognized by this Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), bears a concurrent responsibility as a judge to recuse or be disqualified if an appearance of partiality is created by that expression of opinion in order to protect a litigant's right under the Fourteenth Amendment to Due Process of law?

II. Whether a litigant's Fourteenth Amendment Due Process rights are violated when: (a) the chief justice of a state's highest appellate court (who sits on all appeals), as well as the court itself, fail to respond in any way to a fact-supported motion for recusal addressed to both the chief justice and the court; (b) the court's opinion gives no indication of the degree of the chief justice's involvement; (c) the court fails to record a vote for the chief justice although there are indications he participated in the deliberations; and (d) both the chief justice and the court again fail to address the issue of his involvement in the appeal when the issue was directly raised on application for rehearing?

III. Whether the Due Process protections of the Fourteenth Amendment require that a state appellate court ruling be vacated when one or more appellate judges who participated in the appeal improperly failed to recuse in response to a party's recusal motion?

PARTIES TO THE PROCEEDINGS

Petitioner:

Jefferson County Racing Association, Inc., d/b/a the Birmingham Race Course

Respondent:

David Barber, in his capacity as District Attorney of Jefferson County, Alabama

The following party was also an appellee in the Supreme Court of Alabama, but is not a petitioner in this petition, and is being served as a respondent herein:

Innovative Sweepstakes Systems, Inc.

The following are not parties hereto, but were *amicus curiae* in the proceedings before the Supreme Court of Alabama in support of the Respondent, and are being served as respondents herein:

Bob Riley, Governor of Alabama

Troy King, Attorney General of Alabama

Foundation for Moral Law

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Jefferson County Racing Association, Inc., d/b/a the Birmingham Race Course ("JCRA"), a nongovernmental corporation, submits this corporate disclosure statement:

JCRA has no parent corporation. There is no publicly held corporation that owns ten percent or more of JCRA's stock.

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OPINIONS BELOW

The December 1, 2006 opinion of the Alabama Supreme Court which reversed the January 31, 2006 judgment of the Circuit Court of Jefferson County in favor of the Petitioner Jefferson County Racing Association, Inc., d/b/a the Birmingham Race Course ("JCRA") and held that JCRA's operations were in violation of Alabama Code, § 13A-12-20(10), is set forth in App. A, beginning at App. 1. *See also Barber v. Jefferson County Racing Ass'n, Inc.*, Nos. 1050625 and 1050857, 2006 WL 3462147 (Ala. Dec. 1, 2006).

The December 1, 2006 order of the Alabama Supreme Court which denied JCRA's Motion for the recusal or disqualification of Justices Jacquelyn "Lyn" Stuart, Michael Bolin, and Patti Smith, but failed to address the Motion for recusal or disqualification of Chief Justice Drayton Nabers, is set forth in App. B, beginning at App. 44.

The January 12, 2007 orders of the Alabama Supreme Court overruling JCRA's Application for Rehearing without opinion, are set forth in the Appendices E and F, at App. 69-70.

JURISDICTION OF THE COURT

This Court has jurisdiction to review this matter pursuant to 28 U.S.C. § 1257(a) to decide whether the Alabama Supreme Court violated the Due Process protections of the Fourteenth Amendment of the United States Constitution. The judgment of the Alabama Supreme Court was entered on December 1, 2006. The Petitioner timely sought rehearing, which was denied on January 12, 2007. Accordingly, this Petition is timely.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions involved are: Amendment I and Amendment XIV, § 1 of the United States Constitution. These provisions are set forth in App. G at App. 71.

STATEMENT OF THE CASE

I. BACKGROUND

In the 1950's and 1960's many politicians in Alabama gained notoriety and electoral success by campaigning on their staunch support of racial segregat on laws. More recently, as state lotteries and casinos have encroached into neighboring states, the legality and morality of gambling has become a heated issue in Alabama elections. Public pronouncements of opposition to all forms of gambling have become an important campaign tactic for some candidates. Just as certain politicians in Alabama once pandered to the electorate regarding issues of race, some candidates now found their campaigns on opposition to gambling in order to curry favor with special interest voter groups.[1]

Since this Court's opinion in *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), some candidates for Alabama judicial office have publicly taken formal positions on such topics as well as others and these election campaigns have quickly become indistinguishable from hotly-contested campaigns for non-judicial offices.

Thus, as Alabama politics once represented an extreme in racial demagoguery, it has now become an example of the extremes that may be reached in judicial elections. The broad embrace that certain Alabama judicial candidates have given to the free speech rights recognized in *White*

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[1] Indeed, several powerful political interest groups in Alabama publicly oppose all forms of gambling, even those forms which have been authorized by the Alabama Legislature. The opposition to gambling in Alabama reached a fever pitch in 2000 when opposition forces such as the Christian Coalition of Alabama (now called Christian Action Alabama) (collectively "CCA") succeeded in convincing a majority of voters to defeat a statewide referendum that would have repealed the provision in the Alabama Constitution prohibiting lotteries. It was later learned that in its zeal to oppose gambling, CCA had actually accepted thousands of dollars in gambling-generated contributions from Mississippi casino operators, which was used to fund a campaign to defeat the Alabama lottery referendum. *See, e.g.,* Jim Galloway, *Alabama Group Says It and Reed Have Clean Hands*, Atlanta Journal Constitution, July 2, 2005, at A1; App. L at App. 220.

has not gone unnoticed by those who study the judiciary. Referring to Alabama's recent judicial elections, Roy Schotland, Georgetown University law professor and judicial selection expert stated: "'We may be looking at the first real post-*White* campaigning,' . . . 'You don't have to think about whether you're electing a judge or a state senator. It's disastrous.'" Drew Jubera, *There's Nothing Civil about Ala. Judicial Race, Chief Justice Campaign Turns 'Mean-Spirited,'* Atlanta Journal Constitution, June 5, 2006, at A1; App. L at App. 228. According to the same article, some judicial commentators believe the consequences for Alabama judicial politics, which has been described as "a 'bare-knuckle fight,' a 'political mud bog,' and 'a mess,'" is that "judges' integrity with the public" [is undermined], . . . "the influence of special interest voter groups [is intensified], and . . . "the chances of a jurist having to recuse himself in cases where he has been outspoken on an issue [is increased]." *Id.* at App. 225, 228 (emphasis added).

This petition provides this Court with an opportunity to address the post-*White* tension between a judicial candidate's free speech rights under the First Amendment and a litigant's right to Due Process under the Fourteenth Amendment by defining under what circumstances judges must recuse based upon their prior campaign speech, and what the appropriate remedy is where judges who improperly failed to recuse were part of a multi-member tribunal. This petition presents all the elements necessary for resolution of these questions that naturally follow from *White*: (i) expensive and hotly disputed judicial election campaigns in 2004 and 2006 where Alabama Supreme Court judicial candidates took formal public positions opposing gambling in answer to a powerful special interest group's voter guides;[2] (ii) litigation

[2] CCA is also active in influencing elections of candidates to state offices through the use of widely distributed "voter guides" which set forth the responses of candidates, including those for judicial offices, to the questionnaire on whether the candidate agrees with the CCA position on various issues such as gambling. *See* App. H at App. 105-106, 122. As is plainly noted on its internet web site, Christian Action Alabama opposes all forms of gambling in Alabama, even those such as

(Continued on following page)

involving a sweepstakes promotion, which that special interest group deemed to be gambling; (iii) a widely-disseminated judicial campaign television commercial by the sitting chief justice aired while the appeal was pending, attacking gambling and calling the owner of the company in the sweepstakes case before him a "casino boss"; and (iv) the subsequent refusal on appeal by certain then-elected Alabama Supreme Court justices to recuse or be disqualified by the court, or to even fully address the issue of the apparent partiality of the justices caused by their campaign speech.

A. Pre-Litigation History

In the 1980's, the Alabama Legislature authorized pari-mutuel wagering on horse and greyhound racing in Jefferson County. The Jefferson County Racing Association, Inc. ("JCRA") runs the Birmingham Race Course, which operates facilities for live greyhound racing as well as simulcast horse and greyhound racing from other locations. JCRA's primary business activity is pari-mutuel wagering and racing activities. App. J at App. 200, Stipulated Fact ¶ 7. By 2005, the attraction of pari-mutuel wagering was waning and attendance at the Race Course was decreasing. In an effort to increase attendance and promote authorized pari-mutuel betting, JCRA constructed a CyberCenter at the Race Course, which offered Internet computer terminals that allowed patrons to access the Internet, computer programs, pari-mutuel betting information (such as tip sheets for races) and other information services. *Id.* at App. 200, Stip. ¶ 7; App. 205, Stip. ¶ 22. To access CyberCenter services, patrons purchased Cybertime at fair market value. *Id.* at App. 200, Stip. ¶¶ 8-9. JCRA also contracted with Innovative Systems, Inc. ("Innovative") to design a sweepstakes promotion (the "Sweepstakes") to promote the CyberCenter. *Id.*

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bingo which are lawful. Christian Action Alabama, http://www.ccbama.org/issues/gambling.asp (last visited April 9, 2007).

at App. 199, Stip. ¶ 3; App. 201, Stip. ¶ 10. As part of the promotion, a customer who purchased CyberCenter services also received entries in the Sweepstakes that could result in a cash prize. *Id.* at App. 201, Stip. ¶ 10. Persons who wished to participate in the Sweepstakes but who did not want to purchase Cybertime could obtain "no purchase necessary" Sweepstakes entries. App. J at App. 201, Stip. ¶ 10.

Whether a Sweepstakes entry was a winning entry was determined at the time the entry was issued. *Id.* However, the Sweepstakes was designed so that a participant could reveal his entries in an entertaining manner on a reader that looked and sounded like a slot machine. *Id.* at App. 201, Stip. ¶ 11. Despite their appearances, the readers did not determine the outcome of the sweepstakes entries. *Id.* at App. 207, Stip. ¶ 29. Alternatively a participant could have his entries read on a computer terminal or by calling a toll free number. *Id.* at App. 201, Stip. ¶ 11. If a customer's Sweepstakes entry was a winner, he could obtain more Cybertime or receive a cash payment. App. J at App. 201, Stip. ¶ 11; App. 207, Stip. ¶ 27.

Innovative designed the Sweepstakes, including the free entry feature, to ensure that it complied with Alabama law. Prior to opening the Sweepstakes promotion, Innovative and JCRA took a number of steps to make sure it did not violate Alabama law. Innovative obtained legal opinions from experienced counsel. *Id.* at App. 202, Stip. ¶ 13. JCRA and Innovative: (a) demonstrated the Sweepstakes system for a representative of the Alabama Attorney General, who advised that if the Sweepstakes were operated as represented, it would be legal (*Id.* at App. 211, Stip. ¶ 41); (b) met with the Sheriff of Jefferson County and his attorney and demonstrated how the Sweepstakes would work; (c) spoke with the District Attorney of Jefferson County and invited him to a demonstration (*Id.* at App. 212, Stip. ¶ 43); and (d) demonstrated the Sweepstakes system to the Jefferson County Racing Commission, which enacted a resolution approving the promotion (*Id.* at App. 213, Stip. ¶ 44).

On December 22, 2005, only a short time after the Sweepstakes promotion began, the Sheriff's Department executed a search warrant and seized equipment needed to

operate the Sweepstakes. That same day CCA's president John Giles (who is recognized as one of the "most powerful religious conservatives in the state," Jim Galloway, *Alabama Group Says It and Reed Have Clean Hands*, Atlanta Journal Constitution, July 2, 2005, at A1; App. L at App. 221) wrote to the Alabama Attorney General claiming that JCRA's Sweepstakes promotion was illegal gambling, informing the Attorney General that one of the major tenets of CCA was "protecting our communities from the expansion of gambling," and expressing his disappointment with the lack of leadership that had been shown to "bring a halt to the cancerous plague of gambling expansion" in Alabama. App. J at App. 190.

B. Proceedings in the Circuit Court of Jefferson County

While the raid was going on, JCRA filed a lawsuit in the Circuit Court of Jefferson County to enjoin the Sheriff's seizure of the Sweepstakes' equipment and to obtain a declaration that the promotion was legal under Alabama law. App. D at App. 49. Both Innovative and the District Attorney intervened in the case. *Id.* at App. 48, 49 n.1. The trial court conducted a bench trial and accepted the parties' stipulated facts. *Id.* at App. 50.

CCA had representatives present during the trial. The Sheriff's expert witness, Robert Sertell, admitted that he had been sitting with two representatives of CCA, Dan Ireland and Eric Johnston, during the trial before he was called to testify. App. J at App. 183. Mr. Sertell further admitted that he had conversations about JCRA with CCA president Giles before Sertell's deposition in this case. *Id.* at App. 184-185. Moreover, in his letter to the Alabama Attorney General, Giles described Sertell as a CCA "undercover expert." *Id.* at App. 193.

After the bench trial, the trial court held that the Sweepstakes promotion was lawful and enjoined the Sheriff from further actions against the Sweepstakes. App. D at App. 67.

II. APPEAL BELOW

A. Proceedings in the Supreme Court of Alabama

The District Attorney, but not the Sheriff, appealed the ruling to the Alabama Supreme Court.

B. The Contested Supreme Court Elections

During the appeal, Chief Justice Nabers (who had been appointed to fill a vacancy) was seeking election to that office, and Justice Stuart was up for reelection. Chief Justice Nabers was engaged in a hotly-contested campaign against Judge Sue Bell Cobb that was described as "a rough-and-tumble race" and "the nation's most expensive judicial campaign of the year." Jay Reeves, *Nabers, Cobb Fight for Chief Justice Tops Ala. Judicial Races*, Associated Press, Nov. 7, 2006.

C. Chief Justice Nabers' Campaign Commercial Attacking the Owner of JCRA

While the case was on appeal, Chief Justice Nabers ran television advertisements accusing his challenger of taking "gambling money" for campaign contributions. One of those ads referenced by name contributions from Milton McGregor, who is widely known as the controlling owner of JCRA, and implied that his contributions were tainted or improper.[3] In this advertisement, which aired while the appeal was pending, Chief Justice Nabers proclaimed that he had fought against the "gambling bosses" and even referred to Mr. McGregor as a "casino boss." App. K at App. 218-219. This commercial aired across Alabama and was the subject of much media commentary. One of Nabers' ads claimed that Judge

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[3] The trial court's Declaratory Judgment and Injunction noted that JCRA "has been referred to as Milton McGregor's Company." App. D at App. 148. In addition, CCA president Giles in his letter to the Attorney General notes that JCRA's Birmingham Race Course is "owned by Milton McGregor" App. J at App. 194.

Cobb had "accepted money from gambling interests – including Birmingham Race Track Owner Milton McGregor; the Poarch Creek Indians and PCI Gaming, which run[s] three Alabama casinos; and Greenetrack, which offers video gaming." Eric Valesco, *Gambling Money, False Ad Claims Fly*, The Birmingham News, October 25, 2006; App. H at App. 150-151.

D. JCRA's Motion to Disqualify Chief Justice Nabers

On October 24, 2006, the Alabama Supreme Court issued an Order denying oral argument.[4] App. C at App. 46. Because this Order did not indicate that Justice Nabers had recused or disqualified himself, JCRA immediately filed its Motion to Disqualify Chief Justice Drayton Nabers requesting his recusal or disqualification. App. H at App. 123-133. The Motion, which cited his campaign ad as evidence, argued that Chief Justice Nabers should recuse or be disqualified under both the Alabama Canons of Judicial Ethics ("Ethical Canons") and Due Process grounds. *Id.* at App. 124-129.

E. The Anti-Gambling Statements of Chief Justice Nabers and Justices Stuart, Bolin and Smith to CCA

Shortly after JCRA filed that recusal Motion, CCA released its 2006 General Election Voter Guide.[5] *Id.* at App. 122. Unlike his challenger, who refused to announce her positions on the various issues in the Voter Guide,

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[4] Two appeals were consolidated at the Alabama Supreme Court, and the appeal, therefore, had two case numbers – 1050625 and 1050857.

[5] By this time, CCA had split from the National organization and changed its name to Christian Action Alabama. The split occurred because the National Organization claimed that the Alabama chapter had violated the terms of a settlement agreement with the IRS concerning the organization's candidate questionnaires and voter guides. Robin DeMonia, *A Christian Group by any other Name*, The Birmingham News, September 17, 2006.

Chief Justice Nabers used the Voter Guide to publicly state his opposition to the establishment of gambling. The Voter Guide, which was distributed throughout the State and was available on CCA's website, stated that Chief Justice Nabers "agrees" on the issue of "oppose establishment of gambling." *Id.* Not only is CCA's opposition to all gambling in any form stated in detail on its website, but as noted above, CCA took the position that the very Sweepstakes promotion at issue in this appeal was illegal gambling. *See* App. J at App. 194-196.

Like Chief Justice Nabers, Justices Bolin, Smith and Stuart also used CCA to publicly pronounce their opposition to gambling during their own contested elections. Justice Stuart, who was also involved in a contested election in 2006, used the 2006 CCA Voter Guide to publicly state while the appeal was pending that she agreed with CAA's opposition to the "establishment of gambling." App. H at App. 122. Justices Bolin and Smith, who were involved in contested elections in 2004, both publicly stated during their election campaigns through the 2004 CCA Voter Guide that they, like CCA, "oppose gambling." *Id.* at App. 106. The opponents of Chief Justice Nabers and Justices Stuart, Smith and Bolin in these elections declined to respond to the questionnaires regarding the issue of gambling. *Id.* at App. 106, 122.

F. JCRA's Motions to Disqualify Justices Stuart, Bolin and Smith

After CCA's 2006 Voter Guide was published, JCRA filed its Amendment to Motion to Disqualify Chief Justice Nabers on November 6, 2006. *Id.* at App. 134-144. That same day, JCRA filed its Motion to Disqualify Justice Stuart and shortly thereafter its Motion to Disqualify Justices Bolin and Smith. *Id.* at App. 90-106, 107-22. Among other things, the Amendment and the new recusal Motions noted that the Justices' positions opposing gambling had been made in a CCA voter guide and that CCA had been intimately involved in this case. The Justices and the court were also informed that: CCA had representatives present throughout the trial

who had been sitting with the Sheriff's expert witness; the Sheriff's expert had conversations with CCA's president about JCRA's operation before his deposition in the case; and that the Sheriff's expert had been described by CCA's president as a CCA "undercover expert." App. H at App. 91-92, 108. The Amendment and the new recusal Motions also argued that these Justices should be disqualified under the Ethical Canons and also on Due Process grounds. *Id.* at App. 95-99, App. 112-115.

G. The Rulings on the Motions to Disqualify Justices Bolin, Smith and Stuart and the Lack of a Ruling on the Motion to Disqualify Chief Justice Nabers

On December 1, 2006, the Alabama Supreme Court issued its Opinion in the matter, reversing the trial court and finding that the Sweepstakes' readers were illegal slot machines even though nothing of value was ejected from the readers. *See* App. A at App. 1-36. Alabama precedent had long held that "in order for a gambling device to be defined as a slot machine, it must actually *eject* something of value from the machine." *Holley v. State,* 542 So. 2d 952, 954 (Ala. Crim. App. 1989). This new direction and abandonment of precedent by the Court on the requirements for a slot machine were evident "judicial legislation" and added to the appearance of partiality.[6] By the time the opinion was issued, Chief Justice Nabers had lost his election bid. The Opinion included Statements of Nonrecusal by Justices Bolin, Smith and Stuart, all of whom participated in the appeal and concurred in the Court's Opinion reversing the trial court's ruling in favor of JCRA and Innovative. App. A at App. 36-43. That same day, the remaining members of the Court (except Chief Justice

[6] At the time the appeal was pending, the Alabama governor and attorney general had introduced unsuccessful legislation to bar a parimutuel betting entity like JCRA from conducting a sweepstakes promotion like the one at issue. Phillip Rawls, *Riley, Attorney General Push for Anti-Gambling Bill*, The Decatur Daily, Feb. 8, 2006.

Nabers) issued a short Nonrecusal Order denying JCRA's and Innovative's Motions to Disqualify Justices Bolin, Smith and Stuart and adopting the Statements of Nonrecusal. App. B at App. 44-45. The nonrecusal statements of Justices Bolin, Smith and Stuart and the court's Nonrecusal Order did not address CCA's involvement in the case or Chief Justice Nabers' advertisement calling JCRA's owner a "casino boss." App. A at App. 36-43, App. B at App. 44-45. Chief Justice Nabers never responded to the Motion to Disqualify him, and did not recuse himself.[7] In addition, the Alabama Supreme Court never ruled on the Motion to Disqualify Chief Justice Nabers, even though JCRA had specifically requested that the remaining members of that court order his disqualification or recusal upon his failure to do so. App. H at App. 139, ¶ 7.

H. Chief Justice Nabers' Undisclosed Participation in the Appeal

Although Chief Justice Nabers' name does not appear on the Alabama Supreme Court's Opinion of December 1, 2006, JCRA had reason to believe that he had actually participated in the appeal. JCRA was informed and believed that he was actively involved in the deliberations, and that he participated in an opinion reversing the trial court that was scheduled to be released just before the election but which was then withheld from release after JCRA filed its Motion for his recusal or disqualification. Specifically, JCRA was informed and believed that:

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[7] In contrast, on October 30, 2006, just four days after JCRA filed its Motion to disqualify him, Chief Justice Nabers, in an unprecedented pres- release from the Alabama Supreme Court, announced that because of his prior position as state finance director he was not participating in Exxon-Mobil's appeal of the largest verdict in Alabama history. The Exxon case was (and still is) pending before the Alabama Supreme Court. No disqualification request had been filed in that case. "Nabers' campaign spokesman, Clay Ryan, said he assumed the Supreme Court issued the announcement because 'the honor of the court is being called into question in a series of campaign ads.'" Phillip Rawls, *Chief Justice Steps Aside from Exxon Mobil Appeal*, Associated Press, October 30, 2006.

1. An opinion of the Alabama Supreme Court reversing the circuit court was scheduled to be released on October 27th 2006, less than two weeks prior to the election. App. H at App. 154, ¶ 4.

2. Chief Justice Nabers was present when the case was being discussed by the court, participated in "all deliberations, meetings . . . leading up to the opinion and . . . voted on the case." *Id.* at App. 154, ¶ 5.

3. "Chief Justice Nabers made his position regarding the case known to other members of the Court, brought to bear influence upon other members of the Court to adopt his position, and discussed the political ramifications of the decision with other members of the Court and with political consultants and operatives." *Id.* at App. 155, ¶ 9.

4. Chief Justice Nabers improperly discussed the case with Governor Riley, who advocated the reversal of the trial court's opinion. *Id.* at App. 155, ¶ 6.[8]

I. JCRA's Petition for Rehearing before a Neutral Court

On December 15, 2006, JCRA and Innovative filed timely Applications (Petitions) for Rehearing in the Alabama Supreme Court, requesting a rehearing before a newly appointed, neutral court that was untainted by the involvement of the four justices – Bolin, Nabers, Smith and Stuart – who should have recused themselves or been disqualified from hearing the Appeal. App. H at App. 72-157. JCRA's Application included the grounds that the Due Process Clause of the Fourteenth Amendment required the recusal of Justices Bolin, Nabers, Smith and Stuart. *Id.* at App. 75-76. JCRA also raised each of the points set forth above concerning the undisclosed participation of Chief Justice Nabers in its Application and in an affidavit

[8] Governor Bob Riley, who appointed Chief Justice Nabers and who was seeking re-election, filed an amicus brief in opposition to JCRA's position and issued a press release asking the Court to rule against JCRA. *Id.* at App. 156-157.

supporting the Application. *Id.* at App. 84-85, 153-156. JCRA stressed that the issue of Chief Justice Nabers' participation in the appeal was an issue that the members of that court had an obligation to resolve. Although the District Attorney moved to strike JCRA's affidavit concerning the undisclosed participation of Chief Justice Nabers, a Motion JCRA opposed, the Alabama Supreme Court did not strike the affidavit. Instead, on January 12, 2007, the court merely overruled JCRA's and Innovative's Applications for Rehearing without opinion. App. E at App. 69; App. F at App. 70.

Based on the existence of important Due Process violations, JCRA files this Petition.

REASONS FOR GRANTING THE PETITION

Certiorari review is warranted for consideration of the critical intersection of two fundamental Constitutional rights: (1) the fundamental right of a litigant under the Due Process Clause of the Fourteenth Amendment to have his case decided by a court that is both impartial in fact as well as in appearance, and (2) the right of a judicial candidate under the First Amendment to speak regarding legal issues that may be of interest to certain voters. This case presents the question which inexorably follows from the opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), of when a judicial candidate's exercise of his free speech rights gives rise to a concomitant responsibility by the elected judge under the Due Process clause to recuse where issues or parties on which the judge has stated his opinion come before the court on which he sits.

Since the release of the *White* opinion, this question has been discussed by legal commentators and scholars who have waited for this Court to grant certiorari review in a case like this.[9] The issues presented here are of great

[9] *See, e.g.*, Joanna Cohn Weiss, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101 (2006); Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563 (2004); Jason E. Williams, *Republican*

(Continued on following page)

importance and extend beyond the dispute below. Justices of this Court have repeatedly refrained in their nomination hearings from answering Senators' questions on specific legal issues because to do so would risk the consequence of "undermin[ing] the integrity of the judicial process." *U.S. Senate Judiciary Committee Holds a Hearing on the Nomination of John Roberts to be Chief Justice of the Supreme Court*, 109th Cong., 2005 WL 2237049 (Sept. 14, 2005) (statement of John Roberts). The present case provides the exact contrary scenario – elected judges who have not refrained from speaking on issues likely to come before them, but who instead have used their free speech rights to gain the approval of powerful special interest voter groups. This petition presents this Court with the unique opportunity to define for elected judges the breadth and form of their concomitant responsibility to protect the integrity of the judicial process and to protect a litigant's Due Process rights when the judge as a candidate has used the free speech rights identified in *White*.

The issues raised here give this Court the opportunity to prevent the decay of the character of our judicial system which, as noted by Alexander Hamilton in THE FEDERALIST NO. 78, has neither the power of the "sword [n]or the purse." Court rulings will be respected only as long as the judiciary's integrity is not questioned. If elected judges are viewed as no more than politicians whose "duty to decide cases" does not lead to service of the law but instead to service of special interest voter groups, then the people's trust in the impartiality and fairness of the judiciary will cease. This Court should grant certiorari and issue a ruling that will safeguard not only the Due Process rights of litigants but also the integrity the American judicial system.

Party of Minnesota v. White T[illegible]*eatens Judicial Impartiality in Texas*, 41 HOUS. L. REV. 201 (2004).

ARGUMENT

I. IN ORDER TO GUARANTEE A LITIGANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW, JUDGES WHO USE THEIR RIGHT TO STATE THEIR OPINIONS ON LEGAL OR POLITICAL ISSUES IN AN ELECTION CAMPAIGN HAVE A DUTY TO RECUSE IF AN APPEARANCE OF A LACK OF IMPARTIALITY ARISES WHEN THE ISSUE COMES BEFORE SUCH JUDGES

"The Due Process Clause [of the Fourteenth Amendment] entitles a person to an impartial and disinterested tribunal in both civil and criminal litigation." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). This requirement of impartiality is violated when a judge sits on a case where he has an interest in the outcome that "would offer a possible temptation to the average . . . judge to . . . lead him to not hold the balance nice, clear and true." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). Further, because "justice must satisfy the appearance of justice," Due Process requires a judge's disqualification where such temptation exists even if the judge were actually unbiased. *Aetna*, 475 U.S. at 825 (a case involving a justice of the Alabama Supreme Court) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

Alabama Canon of Judicial Ethics 3C(1) recognizes the full extent of a litigant's right to the impartial tribunal required by Due Process.[10] It states, in relevant part:

> A judge should disqualify himself in a proceeding in which . . . his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has personal bias or prejudice concerning a party. . . .

[10] The canons are not merely suggestive, but have "the force and effect of law." *In the Matter of Sheffield*, 465 So. 2d 350, 355 (Ala. 1985).

(emphasis added). In accord with Due Process protections, disqualification is required under this Ethical Canon when "facts are shown which make it reasonable for members of the public, or a party, or counsel opposed to question the impartiality of the judge." *Acromag-Viking v. Blalock,* 420 So. 2d 60, 61 (Ala. 1982). Thus, the test for recusal under this Ethical Canon is based on the appearance of a lack of impartiality. This is an objective standard, and is not decided by a judge's own subjective belief that he or she can decide the case impartially. Instead, the test is whether a reasonable person with knowledge of the facts would objectively find a reasonable doubt concerning the judge's impartiality. *Ex parte City of Dothan Pers. Bd.,* 831 So. 2d 1, 11 (2002). As discussed below, when faced with JCRA's recusal Motions, the Alabama Supreme Court failed to apply the proper standard for recusal or disqualification based on the appearance of partiality and thereby violated JCRA's Constitutional right to Due Process of law.

The Alabama Supreme Court's December 1, 2006 opinion contained Statements of Nonrecusal for Justices Stuart, Smith and Bolin, who were listed as voting in the opinion. However, there was no statement of nonrecusal for Chief Justice Nabers and his vote was not listed in the opinion, even though, as discussed above, JCRA is informed and believes that he participated in the appeal. App. H at App. 84-85, 153-156. While the court also issued an order which denied the recusal Motions as to Justices Stuart, Smith, and Bolin, it failed to even address the Motion regarding Chief Justice Nabers. App. B at App. 44-45.

A. The Nonrecusals of Justices Bolin, Smith, and Stuart Violated JCRA's Fourteenth Amendment Right to Due Process of Law

Justices Bolin, Smith and Stuart should have recused themselves or been disqualified under the requirements of the Due Process Clause. They had each made a public statement supporting CCA's anti-gambling positions in recent contested judicial elections, with Justice Stuart stating her position while this appeal was pending. CCA

had taken the public position that JCRA's Sweepstakes operation was illegal gambling. CCA was intimately involved in the underlying case – its own "undercover expert" testified against JCRA at trial, and its representatives were present and recognized at the trial. Moreover, the chief justice of their court, who had also sought to curry favor with CCA's members by endorsing CCA's anti-gambling position, was airing television ads calling the owner of JCRA a "casino boss." Given this atmosphere, the Due Process Clause required nothing less than these justices' recusal. Yet, as discussed below, they not only refused to recuse, but their nonrecusal statements and the court's Nonrecusal Order also ignored critical Due Process issues.

Justice Bolin's nonrecusal statement, with which Justices Stuart and Smith concurred and which the Court approved by its separate order denying the recusal Motions, was based on his interpretation of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). Justice Bolin concluded that he had a First Amendment right to "announce or discuss personal views on an issue such as gambling." App. A at App. 41. Although he acknowledged this free speech right may later require his disqualification under Alabama Ethical Canon 3C(1), his analysis of when such disqualification is required, which was adopted by the court as a whole, is fatally flawed and resulted in a violation of the JCRA's Due Process rights. While Justice Bolin noted that the Canon includes a requirement for disqualification of a judge if his "impartiality might reasonably be questioned," he failed to address the point of JCRA's Motion, which was that his disqualification was required under the Canon and under the Due Process Clause because a reasonable person would objectively question his impartiality in deciding the appeal. *Id.* at App. 42. Instead of analyzing his participation under this correct standard, he argued that a judge is presumed impartial and that he could hear the case because of his own subjective belief that he bore no bias or prejudice that

affected his vote.[11] The nonrecusal statements of Justices Stuart and Smith similarly avoided the critical analysis of whether their "impartiality might reasonably be questioned" by an objective observer. Justice Stuart simply wrote that (subjectively) she believed herself to be impartial despite her personal opinion opposing gambling. App. A at App. 36-39. Justice Smith wrote to emphasize her constitutional duty to decide cases. *Id.* at 39-40.

Taken as a whole, the nonrecusal statements of Justices Stuart, Smith and Bolin, which were adopted by the Alabama Supreme Court, erroneously extend this Court's opinion in *White* to an unconstitutional breadth. Those justices (and the Alabama Supreme Court) used *White* to support the position that a judicial candidate's First Amendment free speech rights and a judge's duty to decide cases trump a litigant's Fourteenth Amendment Due Process rights such that recusal or disqualification is not required when the candidate's public statements do not prove actual bias or cause the judge to subjectively admit bias, but only create an appearance of partiality. By failing to address the fundamental issue of the appearance of partiality raised in JCRA's Motions, the Alabama Supreme Court, in effect, wrote this Due Process standard entirely out of the law. However, the First Amendment does not exist in a vacuum. It exists alongside the Fourteenth Amendment and its Due Process requirements.

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[11] Justice Bolin also stated that JCRA's Motion had an "inherent inconsistency" because it was based on his public statement opposing gambling and it is JCRA's contention that its Sweepstakes promotion was not gambling. *Id.* at App. 43. His contention, however, overlooks that the trial court concluded in its final order that while JCRA's Sweepstakes did not violate Alabama's gambling law, it appeared to JCRA's customers that they were gambling. App. D at App. 64. Moreover, the facts presented by JCRA to the Alabama Supreme Court in support of its recusal Motions demonstrated that the CCA was interested in the litigation and had taken a position that the JCRA's Sweepstakes was illegal gambling, App. H at App. 80-81, such that Justice Bolin had been made aware that his public position agreeing with that of the CCA created the appearance he would not be impartial. Thus, there was no inconsistency in JCRA's Motion.

JCRA's Application for Rehearing explained to the Alabama Supreme Court that the reasoning underlying the nonrecusal statements was not supported by a proper reading of *White* and contradicted the long-established standards for Due Process the court itself had recognized. Nevertheless, the court overruled the application without opinion, ignoring the key Due Process issues left unanswered by the nonrecusal statements. This Court must correct these errors of law as the United States Constitution does not and cannot allow Alabama judges to ignore the requirements of the Fourteenth Amendment's Due Process Clause.

B. Chief Justice Nabers' Nonrecusal and His Participation in the Appeal Also Violated JCRA's Right to Due Process of Law

The situation involving JCRA's Motion for the recusal or disqualification of Chief Justice Nabers is unique and constitutes an additional violation of JCRA's right to Due Process of law. In addition to adopting CCA's anti-gambling position, he also ran a campaign ad attacking the well-known owner of JCRA – a litigant before his court – as a "casino boss" when the very issue before the court was whether JCRA's Sweepstakes was illegal gambling. There can be no question that the Due Process Clause demanded his recusal or disqualification. Chief Justice Nabers himself stated that if a judicial candidate declares a position during a campaign that a litigant thinks hurts his case, the litigant can file a motion for recusal. Drew Jubera, *There's Nothing Civil about Ala. Judicial Race, Chief Justice Campaign Turns 'Mean Spirited'*, Atlanta Journal Constitution, June 5, 2006, at A1; App. L at App. 299. But when JCRA made such a motion, both Chief Justice Nabers and the Alabama Supreme Court ignored it and acted as if it had never been made.

Moreover, there are ample reasons to support a conclusion that, while his name does not appear on the opinion ultimately released, Chief Justice Nabers was involved in the court's deliberations. Admittedly, the factual allegations of the affidavit of Milton McGregor filed in support of the

Application for Rehearing were not based upon first-hand knowledge but upon information and belief. This is because discovery regarding the cloistered deliberations of the Alabama Supreme Court was simply not available on the Application for Rehearing. Neither Chief Justice Nabers nor the court has denied the factual allegations. Instead, the court left the issue of Chief Justice Nabers' participation glaringly unanswered.

The following points, however, must be noted:

- Although the District Attorney moved the Alabama Supreme Court to strike the McGregor affidavit, the court did not respond to the Motion and thus the affidavit has not been stricken.
- Though, in the weeks leading to the December 1, 2006 release of the court's opinion in the case below, Chief Justice Nabers had issued a *sua sponte* recusal statement in another pending appeal, he did not respond to JCRA's recusal Motion. *See supra* at 11 n.7.
- The Alabama Supreme Court issued an order addressing the recusal Motions concerning Justices Bolin, Smith and Stuart but did not address the one concerning Chief Justice Nabers.
- Chief Justice Nabers and the Alabama Supreme Court had the opportunity to deny the allegations concerning Chief Justice Nabers' participation in the appeal but have never done so.

These points add to the appearance of partiality created by Chief Justice Nabers' refusal to recuse and his failure to be disqualified by the court.

Moreover, even without consideration of the affidavit, it is clear that (1) despite taking a public position against even legal forms of gambling by means of the CCA voter guide, (2) despite basing his election campaign on "fighting gambling," (3) despite disparaging the majority owner of JCRA as a "casino boss" in a campaign advertisement aired while the appeal was pending, and (4) despite criticizing his political opponent for accepting a campaign contribution from that person (App. H at App. 149-152), Chief Justice Nabers did not recuse or disqualify himself

in the appeal below, which involved a sweepstakes operation claimed by the district attorney and the CAA to be gambling, when asked to do so. Instead, both he and the court ignored that Motion and remained silent regarding the degree of his participation in the deliberations, as if ignoring the issue would make it go away. However, this continuing silence shouts loudly. It proclaims that no member of the court is willing to go on record and simply state that Chief Justice Nabers did not participate in the appeal.

Regardless of the fact that a vote was not recorded for Chief Justice Nabers on the court's opinion, given the nature of his public statements and advertisements in a multi-million dollar political campaign for Alabama's highest judicial office while the appeal was pending, his failure to recuse or be disqualified, resulted in a violation of JCRA's Constitutional Due Process right to a tribunal which had the appearance of impartiality. Given that Chief Justice Nabers did not recuse himself and was not disqualified by the Court, the fact that no vote was recorded for him on the Court's opinion is not an indication that he did not participate in the Court's deliberations. Instead, his failure to affirmatively recuse or be disqualified, combined with his and the court's silence on the issue on Application for Rehearing, further heightens the appearance of partiality. Accordingly, this Court should hold that Chief Justice Nabers' nonrecusal and the lower court's failure to disqualify him was a violation of JCRA's right to Due Process.

II. BECAUSE THE INFLUENCE ON A PANEL DECISION BY A JUDGE WHO FAILS TO RECUSE AND IMPROPERLY PARTICIPATES IN DELIBERATIONS CANNOT BE MEASURED, DUE PROCESS REQUIRES THAT THE RULING BE VACATED AND A NEW UNTAINTED PANEL APPOINTED

To remedy the Due Process violations of the Alabama Supreme Court, this Court must vacate the December 1, 2006 opinion of the Alabama Supreme Court and remand the appeal to be decided by an Alabama Supreme Court

composed of justices untainted by the violations.[12] This remedy is supported by the holding in *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986), particularly the concurring opinions of three Justices of this Court, as well as by opinions of the Circuit Courts of Appeals, federal district courts, and state appellate courts. This body of case law going back more than sixty years demonstrates that Due Process mandates not only that tribunals be impartial, but also that they have the full appearance of impartiality. Our Constitution demands no less. *In re Murchison,* 349 U.S. 133, 136 (1955).

In *Aetna,* this Court vacated the ruling of the Alabama Supreme Court because the participation by Justice Embry violated the appellant's Fourteenth Amendment Due Process rights. This Court held that because Justice Embry had a "direct, personal, substantial [and] pecuniary" interest in the appeal before the court, he impermissibly acted "as a judge in his own case." 475 U.S. at 814 (citations omitted). This Court further held that Justice Embry's involvement offered the possible temptation for him "not to hold the balance nice, clear, and true" and thereby violated the appellant's Due Process rights. *Id.* at 822 (citations omitted). This violation occurred not because it was determined that Justice Embry was actually biased, but merely because the facts demonstrated that the Alabama court's ruling lacked the appearance of impartiality required by the Due Process Clause. *Id.* This Court determined that the appropriate remedy for the violation, based on the fact Justice Embry had cast the decisive vote in a 5-4 decision and had authored the opinion, was to vacate the ruling in order to serve the "appearance of justice." *Id.* at 825.

Moreover, *Aetna* suggests that had different facts been presented, this Court would have recognized a Due Process violation even if Justice Embry had been less involved. This Court explained that because the parties had not

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[12] Alabama law provides for the appointment of special justices to sit on appeals where there are an otherwise insufficient number of justices to decide the appeal. *See* Ala. Code § 12-2-14; *City of Bessemer v. McClain*, No. 1031917, 2006 WL 2089923, at *5 (Ala. July 28, 2006).

briefed or argued the broader issue of whether the improper involvement of only one member of a multi-member panel would require vacatur of the panel's decision, it was inappropriate to address the issue. *Id.* at 828 n.4. However, the concurring opinions of Justices Brennan and Blackmun, with whom Justice Marshall joined, stated that the Court's opinion should not be read as being dependent on the fact that Justice Embry cast the decisive vote or wrote the opinion.

Justice Brennan stated that the *Aetna* opinion should not be interpreted as applicable only where a judge improperly fails to recuse and casts the deciding vote. He explained:

> *Finally*, I understand that the Court's opinion is not to be read to suggest that the outcome might be different had Justice Embry not provided the necessary fifth vote in the court below. . . . Justice Embry's participation in the court's resolution of the case, while he was fully aware of his interest in its outcome, was sufficient in itself to impugn the decision. . . . [E]xperience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberation process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

475 U.S. at 830-31 (Brennan, J., concurring) (italics in original, underline added).

Justice Blackmun, joined by Justice Marshall, concluded that any participation by Justice Embry in the lower court's deliberations was sufficient to violate Due Process. Justice Blackmun noted that the influence of a biased judge on the opinion of a court cannot be measured. *Id.*

> [E]ven if had Justice Embry not written the court's opinion, his participation . . . would have violated the Due Process Clause. . . . To discern a constitutionally significant difference between the author of an opinion and the other judges

> who participated in a case ignores the possibility that the collegial decisionmaking process that is the hallmark of multimember courts led the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity. And because this collegial exchange of ideas occurs in private, a reviewing court may never discover the actual effect a biased judge had on the outcome of a particular case. We should not attempt the . . . task of distilling Justice Embry's particular contribution to determine whether the result would have been the same had he disqualified himself at the outset. I would not want other appellate courts to read the Court's opinion today to suggest that such an inquiry provides an appropriate guarantee of due process.
>
> The violation of the Due Process Clause occurred when Justice Embry sat on this case, for it was then the danger arose that his vote and his views, potentially tainted by his interest in the pending Blue Cross suit, would influence the votes and views of his colleagues.

475 U.S. at 832-33 (Blackmun, J., concurring in the judgment) (emphasis added).

In sum, the *Aetna* holding demonstrates that the appearance of partiality on the part of the Alabama Supreme Court created by the refusal of Justices Bolin, Nabers, Smith and Stuart (or any single justice) to recuse resulted in a violation of JCRA's rights under the Due Process Clause. Furthermore, as the *Aetna* concurring opinions make clear, the only sufficient remedy for this violation is vacatur of the Alabama Supreme Court's opinion. What is at stake here – the very integrity of our judicial system – demands nothing less. Such a ruling would be fully consistent with opinions based on similar circumstances from the majority of United States Circuit Courts of Appeals that have considered the issue, as well as many other courts.

A. United States Circuit Courts of Appeals Have Vacated Rulings of Multimember Panels Based on the Appearance of Partiality Caused by the Nonrecusal and Participation of a Member Who Was Not the Deciding Vote

The vast majority of the Circuit Courts of Appeals that have addressed the issue have held that a ruling by a multimember tribunal is fatally tainted if only one member wrongly participated because of bias or the appearance of bias, even if such member's vote was unnecessary to reach a majority vote.[13] The seminal opinion is *Berkshire Employees Ass'n of Berkshire Knitting Mills v. National Labor Relations Bd.*, 121 F.2d 235 (3d Cir. 1941). The court was presented with a petition to set aside a ruling of the National Labor Relations Board ("NLRB") and a petition to seek evidence from the NLRB on whether the mill and the employees' association (collectively "Berkshire") had received a "full and fair hearing" before the NLRB. 121 F.2d at 236. Berkshire sought evidence that prior to the hearing a member of the NLRB had asked an executive of a client company of Berkshire to influence Berkshire about an employee strike. *Id.* at 238.

Although the Third Circuit recognized that an administrative body such as the NLRB plays a different and broader role than that of a court, it recognized that "resolution of contested questions by an impartial and disinterested tribunal" was still required by Due Process. *Id.* The court

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[13] Six of the seven Circuit Courts of Appeals that have decided the issue have ruled favorably to the Petitioner's position. *See Texaco, Inc. v. Federal Trade Comm'n*, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965); *Cinderella Career & Finishing Schs., Inc. v. Federal Trade Comm'n*, 425 F.2d 583 (D.C. Cir. 1970); *Berkshire Employees Ass'n of Berkshire Knitting Mills v. National Labor Relations Bd.*, 121 F.2d 235 (3d Cir. 1941); *American Cyanimid v. Federal Trade Comm'n*, 363 F.2d 757 (6th Cir. 1966); *Antoniu v. Sec. & Exch.*, 877 F.2d 721 (8th Cir. 1989); *Yamaha Motor Corp. v. Riney*, 21 F.3d 793 (8th Cir. 1994); *Stivers v. Pierce*, 71 F.3d 732 (9th Cir. 1995); *Staton v. Mayes*, 552 F.2d 908 (10th Cir. 1977); *Hicks v. City of Watonga*, 942 F.2d 737 (10th Cir. 1991). The only Circuit Court of Appeals not to adopt the majority view is the Fifth Circuit. *See Bradshaw v. McCotter*, 796 F.2d 100 (5th Cir. 1986).

rejected the NLRB's contention that its decision should be upheld because only one member of the Board was alleged to have lacked impartiality and he was not the deciding vote. It held that: "Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured." *Id.* at 239 (emphasis added). Based on the conclusion that Berkshire's Due Process rights may likely have been violated, the Court of Appeals granted the petition for it to seek evidence, with the case to be reconsidered by the members of the board who were not disqualified should such bias be proved. *Id.*

Cinderella Career and Finishing Schools, Inc. v. Federal Trade Comm'n, 425 F.2d 583 (D.C. Cir. 1970), illustrates the proper ruling in a case involving public statements by members of the tribunal. Cinderella sought relief from orders of the Federal Trade Commission ("FTC") relating to certain allegedly deceptive business practices. 425 F.2d at 584. Cinderella argued that the chairman of the FTC should have recused himself from the review of the initial decision of a hearing examiner because the chairman had made public statements which suggested he had prejudged the case. *Id.* at 584-85.

A public speech made by the chairman while Cinderella's appeal of the hearing examiner's ruling was pending criticized "ads that offer a college education in five weeks," and indicated to the Circuit Court of Appeals his bias against Cinderella. *Id.* at 590. Noting that it had "no concern for or interest in the public statements of government officers, but . . . [was] charged with the responsibility of making certain that the image of the administrative process is not transformed from a Rubens to a Modigliani," and, quoting *Berkshire,* the Circuit Court vacated the FTC's ruling and remanded the case for reconsideration without the chairman. *Id.* at 590, 592.

Stivers v. Pierce, 71 F.3d 732 (9th Cir. 1995), recognized that the concurring opinions in *Aetna* are consistent with the older case law from the Circuit Courts of Appeals. In *Stivers,* the Ninth Circuit had to decide whether a

district court had erred in granting summary judgment on the plaintiff's claim against members of Nevada's private detective licensing board for allegedly violating his Due Process rights. The court found Stivers had a right to an unbiased tribunal and held that this right was violated when a single biased member of the board took part in the unanimous ruling denying him a license. 71 F.3d at 746-48. The court looked to the concurring opinions in *Aetna* and the opinions in *Cinderella* and *Berkshire* to answer the question of "whether bias on the part of one member of a multi-person tribunal violates Due Process, without any showing that the member's bias affected the tribunal's decision." *Id.* at 746-47. Noting that the issue had not been addressed by the majority opinion in *Aetna,* but that the concurring opinions and other Circuit Courts of Appeals had held that such a Due Process violation still required vacatur of the ruling, the *Stivers* court concluded:

> As Justice Brennan observed in *Aetna Life,* it is difficult if not impossible to measure the impact that one member's views have on the process of collective deliberation. Each member contributes not only his vote but also his voice to the deliberative process. Thus, the fact that the tribunal's vote was unanimous does not mean that the bias of one member had no effect on the result.
>
> We therefore hold that where one member of a tribunal is actually biased, or where the circumstances create the appearance that one member is biased, the proceedings violate due process. The plaintiff need not demonstrate that the biased member's vote was decisive or that his views influenced those of other members.

Id. at 747-48 (footnote omitted, emphasis added).

Likewise, several other Courts of Appeals opinions have involved public statements by a tribunal member which caused an appearance of bias resulting in a Due Process

violation even though the biased member did not cast the deciding vote.[14]

B. State Court Decisions Also Support Vacatur and Remand in this Case

Although there are several opinions by state appeals courts and federal district courts addressing the issue of whether the ruling of a tribunal must be vacated if one of its members failed to recuse and improperly participated, two state supreme court opinions address the issue when the tribunal is an appeals court. In *Johnson v. Sturdivant*, 758 S.W.2d 415 (Ark. 1988), the court was petitioned for rehearing by Georgia Pacific Corporation seeking the disqualification of the original opinion's author, Justice Purtle, because he had a personal claim pending against an insurer of one of the other appellants and, relying on *Aetna,* also seeking the disqualification of other justices that had participated in the ruling. 758 S.W.2d at 415-16. The court recognized that under *Aetna* its opinion had to be vacated because Justice Purtle had authored the opinion, but also recognized that, like here, because the opinion had "depart[ed] from past decisions and head[ed] in a different direction," disqualification of all the judges who participated and appointment of a court of special justices to decide the appeal was required in order to preserve the public's trust. *Id.* at 416. The Court explained:

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[14] *See Texaco, Inc.*, 336 F.2d at 760 ("Chairman Dixon's participation in the hearing amounted . . . to a denial of due process which invalidated the order under review."); *Staton*, 552 F.2d at 914 (holding that Staton had a viable "civil rights claim" because statements made by "Mayes for the removal of Dr. Staton . . . reveal a tribunal not meeting the demands of due process for a hearing with fairness and the appearance of fairness."); *Antoniu*, 877 F.2d at 726 ("Even though Cox recused himself prior to the filing of the SEC's final decision, there is no way of knowing how Cox's participation affected the Commissioner's deliberations. Accordingly, we nullify all Commission proceedings. . . ."); *Hicks*, 942 F.2d at 748 (holding that Hicks had a viable claim under 42 U.S.C. § 1983 because "if Mrs. Diffy is found to have been biased when she cast her vote . . . , her presence will have tainted the tribunal.").

"While we are not expected to be a perfect institution, we are expected to always try to do the right thing. . . . Given the unavoidable choice of letting a decision stand under a cloud or removing the cloud entirely, we choose the latter." *Id.* Although not expressly stated, the Arkansas Supreme Court's ruling was plainly dictated by the conclusion that such action was necessary to preserve the appellant's Due Process rights. The same result is warranted here, where the Alabama Supreme Court's opinion not only involved a Due Process violation by the participation and votes of justices who should have recused, but also involved an opinion, like the one by the court in *Johnson,* that "headed in a different direction" in relation to its interpretation of Alabama's gambling device statute.

In *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.,* 894 P.2d 337 (1995), *overruled on other grounds by Towbin Dodge, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 112 P.3d 1063 (Nev. 2005), the Nevada Supreme Court was presented with a petition for rehearing based on the contention that a judge sitting on the appeal should have recused. The recusal motion was based on the judge's membership on the advisory board for a foundation allegedly associated with PETA. 894 P.2d at 433-34. Although the court concluded that the judge was not actually biased, it granted the motion to disqualify "to avoid even the appearance of impropriety and to promote public confidence in the integrity of the judicial process." *Id.* at 438. The *PETA* court then vacated the opinion even though the judge had not cast a decisive vote. Citing the concurring opinions in *Aetna*, the *PETA* court concluded that although the judge's vote could be considered surplusage because three other justices signed the opinion, "the role collegiality plays in appellate decisions mandates full reconsideration of this matter." *Id.* at 341-42.

These federal and state court opinions demonstrate that what is required of the members of a tribunal in order to render rulings in accordance with a party's right to Due Process of law has not changed in sixty years. In this case concerning whether JCRA's Sweepstakes promotion was illegal gambling, four Alabama justices had made political

statements agreeing with CCA's position opposing any form of gambling, CCA had taken the public position that JCRA's Sweepstakes was illegal gambling, CCA had participated in the bench trial, and the expert who testified against JCRA was proclaimed to be a CCA "undercover expert." However, the court ignored the facts of CCA's participation in the case and failed to answer the issue of the appearance of partiality raised in JCRA's Motions to Disqualify. Moreover, even though the chief justice aired a campaign commercial during the appeal calling the owner of JCRA a "casino boss," both he and the court failed to even acknowledge JCRA's Motion to Disqualify him. Under these facts, the appearance of bias on the part of four members of the Alabama Supreme Court unquestionably violated JCRA's Due Process rights and requires that the court's opinion be vacated.

CONCLUSION

This Court's opinion in *White* recognized that a judicial candidate has a right under the First Amendment in an election campaign to state his or her positions on issues or parties. That opinion did not answer the question of what Due Process requires the judge to do when such issues or parties come before the elected judge. The answer to that question, now presented here, is that when the judge's use of free speech intrudes upon a litigant's rights under the Fourteenth Amendment thereby creating a court that has the objective appearance of partiality, the judge must recuse or be disqualified. The amazing facts and circumstances presented by this Petition demonstrate that four justices of the Alabama Supreme Court should have recused or been disqualified, but were not, resulting in glaring violations of JCRA's Due Process rights. Accordingly, JCRA requests the vacatur of the Alabama Supreme Court's opinion as the remedy for such a violation.

Respectfully submitted,

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Appendix A

APPENDIX A – OPINION OF THE ALABAMA SUPREME COURT FILED DECEMBER 1, 2006

Notice: This opinion is subject to formal revision before publication in the advance sheets of *Southern Reporter*. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in *Southern Reporter*.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2006-2007

1050625

David Barber, in his capacity as District Attorney for the Tenth Judicial Circuit of Alabama

v.

Jefferson County Racing Association, Inc., d/b/a the Birmingham Race Course; and Innovative Sweepstakes Systems, Inc.

1050857

David Barber, in his capacity as District Attorney for the Tenth Judicial Circuit of Alabama

v.

Jefferson County Racing Association, Inc., d/b/a the Birmingham Race Course; and Innovative Sweepstakes Systems, Inc.

Appendix A

Appeals from Jefferson Circuit Court
(CV-05-7684)

(Filed Dec. 1, 2006)

WOODALL, Justice.

David Barber, in his capacity as District Attorney for the Tenth Judicial Circuit of Alabama, appeals from a judgment in favor of the Jefferson County Racing Association, Inc., d/b/a the Birmingham Race Course ("the JCRA"), and Innovative Sweepstakes Systems, Inc. ("Innovative") (referred to collectively as "the owners"), in the owners' action for injunctive and declaratory relief as to allegations that they are operating illegal gambling devices at the Birmingham Race Course ("the race course"). We reverse that judgment and render a judgment for Barber.

I. Procedural Background

On December 15, 2005, the owners began operating at the race course an activity they advertised as a "Quincy's MegaSweeps" ("the MegaSweeps"). The activity was interrupted on December 22, 2005, when Jefferson County Sheriff Mike Hale began executing a warrant authorizing the seizure of all records and computer equipment related to the operation of the MegaSweeps. That same day, the JCRA filed a complaint against Sheriff Hale seeking declaratory and injunctive relief from the seizure. The JCRA alleged that it was "conducting a *sweepstakes* promotion at the race course to promote the race course and its lawful activities as well as the *opening of an internet café and digital communications center.*" (Emphasis added.) The JCRA sought a judgment (1) declaring that

its MegaSweeps operation was lawful and (2) enjoining Sheriff Hale from interfering with its MegaSweeps operation. It also sought a judgment declaring that the "Alabama gambling statutes . . . upon which the . . . search and seizure [were] based" are "unconstitutionally vague." It more specifically challenged the constitutionality of Ala. Code 1975, § 13A-12-20(4), which *defines gambling*. By consent of the parties, the trial court issued a preliminary injunction, enjoining further seizure of equipment and ordering the return of all property that had been removed from the race course. The court, however, also enjoined operation of the MegaSweeps pending resolution of the underlying dispute.

On December 29, 2005, Innovative, as the owner of the computer equipment and system at issue in this case, moved to intervene. That motion was granted on January 4, 2006. On January 17, 2006, Barber moved to intervene and filed a counterclaim for declaratory and injunctive relief. Barber sought a judgment declaring (1) "that the components of the [MegaSweeps] operation . . . are in fact illegal gambling devices that are subject to forfeiture" and (2) "that the operation . . . is an illegal lottery under Section 65 of the Alabama Constitution and Alabama Code § 13A-12-20, *et seq.*" He also sought an order permanently enjoining the operation of "such gambling devices and/or a lottery in Jefferson County." That same day, the trial court granted Barber's motion to intervene. The Alabama Attorney General appeared in the case and filed a memorandum in opposition to the owners' constitutional challenge.

Subsequently, on January 31, 2006, following a bench trial, the trial court – without specifically referring to

Barber's counterclaims – entered a judgment declaring that the MegaSweeps operation was not a lottery and that it did not involve the use of slot machines or gambling devices. The court permanently enjoined Sheriff Hale "from further actions against [the MegaSweeps] operations at the [race course], provided [the owners] operate the [MegaSweeps] as represented."

Sheriff Hale did not appeal. However, on February 14, 2006, Barber filed a notice of what purported to be an interlocutory appeal in case no. 1050625, challenging the injunctive aspect of the trial court's judgment. Specifically, the issue, as Barber framed it on his docketing statement, was "[w]hether the trial court properly enjoined law enforcement from seizing equipment used in such operation or otherwise taking action against the MegaSweep[s] operation at the Birmingham Race Track." Concurrently, he filed a motion in the trial court to alter, amend, or vacate the judgment, or to grant a new trial. In that motion, Barber contended, among other things, that the January 31 judgment was not final because it did not refer specifically to his counterclaims. That same day, the owners moved this Court to dismiss Barber's interlocutory appeal. They contended that the January 31, 2006, judgment was, in fact, a final judgment, effectively disposing of Barber's counterclaims and precluding an *interlocutory* appeal. Furthermore, they argued, Barber's pending postjudgment motion rendered an appeal of a *final* judgment premature.

On March 21, 2006, the trial court denied Barber's post-judgment motion. The following day, the owners apprised this Court of that order and asserted that Barber's interlocutory appeal merged with the final judgment,

from which he had a right to appeal. On that ground, they urged us to dismiss the appeal in case no. 1050625. Also, on March 22, 2006, Barber appealed from the postjudgment order, in case no. 1050857. The appeals were consolidated for briefing. Various amici curiae filed briefs in support of Barber, namely, (1) Governor Bob Riley, (2) Attorney General Troy King, (3) the Alabama District Attorneys Association, and (4) the Foundation for Moral Law ("the Foundation").

The parties now agree that all the issues presented in this dispute are subsumed in case no. 1050857. Consequently, we dismiss the appeal in case no. 1050625 as moot.

II. Case No. 1050857

Two dispositive issues are presented: (1) whether the MegaSweeps operation at the race track involves the use of slot machines and, if so, (2) whether the definition of gambling in § 13A-12-20, Ala. Code 1975, is unconstitutionally vague.

A. Standard of Review

Our review of a declaratory judgment is ordinarily governed by the *ore tenus* standard. *State Farm Mut. Auto. Ins. Co. v. Brown,* 894 So. 2d 643 (Ala. 2004); *Alfa Mut. Ins. Co. v. Small,* 829 So. 2d 743 (Ala. 2002). However, the standard "is not applicable where the evidence is undisputed, or where the material facts are established by the undisputed evidence." *Salter v. Hamiter,* 887 So. 2d 230, 234 (Ala. 2004). Neither does the *ore tenus* rule apply to the trial court's legal conclusions or misapplications of the

law to undisputed facts. *Eubanks v. Hale,* 752 So. 2d 1113, 1144-45 (Ala. 1999).

The material facts in this case are undisputed or uncontroverted and the questions presented are legal ones, as the trial court expressly acknowledged. Therefore, our review is *de novo. Brown,* 894 So. 2d at 647.

B. Slot Machine

Barber contends that the MegaSweeps operation involves the use of slot machines, in violation of Ala. Code 1975, § 13A-12-27. Section 13A-12-27 provides, in pertinent part:

> "(a) A person commits the crime of possession of a gambling device if with knowledge of the character thereof he manufactures, sells, transports, places or possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody or use of:
>
> "(1) A slot machine; or
>
> "(2) Any other gambling device, with the intention that it be used in the advancement of unlawful gambling activity."

A "slot machine" is defined as follows:

> "A gambling device that, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such a manner that, depending upon elements of chance, it may eject something of value. A device so constructed or *readily adaptable or convertible to such use is no less a slot machine because* it is not in working

> order or because *some mechanical act of manipulation or repair is required to accomplish its adaptation, conversion or workability. Nor is it any less a slot machine because apart from its use or adaptability as such it may also sell or deliver something of value on a basis other than chance.*"

Ala. Code 1975, § 13A-12-20(10) (emphasis added).[1]

> "A person engages in gambling if he stakes or *risks something of value* upon the outcome of a contest of *chance* or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will *receive something of value* in the event of a certain outcome."

Ala. Code 1975, § 13A-12-20(4). "Something of value" is defined as "[a]ny money or property, . . . or article exchangeable for money or property or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service entertainment or a privilege of playing at a . . . scheme without charge." Ala. Code 1975, § 13A-12-20(11).

Barber insists that the trial court erred in discounting the operation and effect of key pieces of computer equipment when they are integrated within the MegaSweeps network. He contends that when those pieces are considered "collectively," they are gambling devices within the

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[1] A "gambling device" is defined as "[a]ny device, machine, paraphernalia or equipment that is normally used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine." Ala. Code 1975, § 13A-12-20(5).

context of § 13A-12-27. This contention requires a description of the components of the MegaSweeps system and how it functions as an integrated whole in its historical context.

1. Function of the System

On January 14, 2006, before Barber moved to intervene, the parties filed a joint stipulation of facts ("the stipulation"). According to the stipulation, as supplemented by facts that are undisputed or uncontroverted, Innovative is a wholly owned subsidiary of Multimedia Games, Inc. ("Multimedia"), which "provides computer equipment and software to promote the gaming activities of Native American, charitable gaming establishments, and state, national, and international lotteries."[2] In 2005, Multimedia began discussions with the owners of the race course regarding the development of a project to promote the race course, the "primary business activity" of which "is pari-mutual wagering and racing activities for its patrons." Those discussions produced the scheme for the MegaSweeps operation.

To implement its plan, Multimedia devised a sophisticated computer system to be installed at the race course.[3] The JCRA describes it as a "unique one-of-a-kind system that was basically developed from scratch." JCRA's brief, at 58 n.18. Essentially, it involved the *sales of Internet*

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[2] Direct quotations in Part II.B.1. of this opinion are from the stipulation unless otherwise noted.

[3] According to Multimedia's chief executive officer, the system used at the race course is the "most sophisticated" system in operation.

access in conjunction with *chances to win cash prizes.* "Innovative was incorporated to continue Multimedia's implementation, design and deployment of" the system.

The Internet-access aspect of the system installed at the race course is variously described as a "cyber café" or "the CyberCenter."

> "8. Patrons obtain access to the services of the CyberCenter by purchasing computer access time ('cybertime') at a rate of one (1) dollar for four (4) minutes. . . .
>
> "9. *The rate[ ] charged for [cybertime] is fair market value.*
>
> ". . . .
>
> "22. The products and services offered at the CyberCenter . . . provide for [, among other things,] . . . personal computer usage, Internet access and voice communications via the Internet, and information on pari-mutual wagering. . . . The CyberCenter features computer terminals that provide access to a personal computer with broadband Internet connection where users can browse the Internet, access email, and learn about and use commercial software applications licensed for use on that computer terminal. The package offered at the CyberCenter includes . . . services such as photocopying, printing, photographic reproduction . . . ; access to software programs for use in preparing tax returns, computer games, and basic computer skills tutorials (for Windows, Microsoft Office, other programs and the Internet itself); and the sale or rental of certain computer hardware, including headsets that can be used for voice

communications and flash drives for data retention and transfer. . . .

". . . .

"24. Customers must have an account in order to purchase cybertime. With that account number, the System keeps track of how much cybertime a customer has purchased and how much that customer has used. The account is accessed through a plastic account access card containing an encoded magnetic strip similar to a credit card. Once cybertime has been purchased, it can be used at any one of the . . . computer terminals located in the CyberCenter on both floors of the Birmingham Race Course facility. The computer terminals have restricted access requiring use of attached card swipe readers."

The *gaming aspect* of the system is explained in the stipulation as follows:

"10. The Birmingham Race Course offers a sweepstakes called the [MegaSweeps]. For every one (1) dollar of cybertime purchased, the consumer receives 100 entries in the [MegaSweeps]. The results of the respective entries, i.e., whether each is a winning or losing entry, are *predetermined when the consumer purchases cybertime at the point of purchase.*

"11. The customer determines whether the sweepstakes entries are winners by reading the results online or on one of the 116 computers in the CyberCenter, calling a toll-free phone number, or by *placing the computer access card in one of more than 1,300 electronic readers* ['the readers'] that *display winning and losing entries in an entertaining format,* but standing alone are

otherwise *dumb terminals.* Once the results have been revealed, winning entries are paid. . . .

". . . .

"18. All sweepstakes entries, whether obtained with the *purchase of cybertime,* by mail [*without a purchase*], or by request at the facility [*without a purchase*], are drawn in the same manner. Entries cannot be changed or altered at any time.

"19. Although a customer does not immediately know the sweepstakes results when the entries are [assigned] to him, the customer is provided with a number of ways to reveal the results. The customer can learn the outcomes of his sweepstakes entries by accessing a website remotely, using the computer terminals, by calling a toll-free phone number, or by revealing the outcomes on a reader.

"20. The Birmingham Race Course has *over 1,300 readers.* The readers are divided among different entertainment scenarios, and each reader reveals a batch of entries in a quantity selected by the customer. The customer swipes his account card to activate a reader. Once activated, the customer *presses a button on the reader* to see the results of the selected number of entries.

"21. The entries the customer receives after the purchase of cybertime are the same entries that are revealed. When a customer's sweepstakes entries are revealed, those sweepstakes entries are marked as revealed and they cannot be revealed again. If a customer chooses to use a reader to reveal entries, a server selects the order in which a customer's outcomes are revealed.

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> The *total prize value of the subset is sent to the reader* so the reader can show the outcome to the customer. For example, when a customer elects to reveal five of the customer's sweepstakes entries, a server might select five of the customer's sweepstakes entries that happen to be non-winners, in which case the appropriate communication would be relayed to the reader, and the reader would display that outcome to the customer. Alternatively, a server might select five of the customer's sweepstakes entries that happen to be winners and relay the appropriate communication to the reader. The reader will ultimately display the exact value of the customer's sweepstakes entries."

(Emphasis added.)

The trial court found that the "readers are designed and arranged so that they look and sound like slot machines." Lt. Paul Hogan, who conducted preseizure "undercover operations" at the race track, stated that the readers would indicate a winning entry by "dings, tones and simulated change falling as in a slot machine." According to Lt. Hogan, the readers also had casino-style names "such as Bunch O'Luck, Crazy Blue Streak, Reel Thrills, Sun Dogs, Flamingo 7's, Major Money, Krazy Farm, Ed McMahon's Star Magic, Cherry Pop, Fruit Cocktail Deluxe, China Seas, Lock and Win, Double Cash Money, and many others." The payout percentage, that is, the ratio of winnings to the amount expended by the players, is 92%. Indeed, the typical reader was originally manufactured as a slot machine and had been modified for use in conjunction with the peculiar components of the MegaSweeps system, which include:

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"26. *Central Database.* The central component of the System is a database where the customer's account is tracked. The account maintains the cardholder's information, the balance of purchased cybertime remaining, the quantity of sweepstakes entries issued, and the balance of sweepstakes winnings revealed, but not yet redeemed.

"27. *Point of Sale Terminals.* The Point of Sale Terminals allow customers to purchase cybertime for their accounts and to redeem any revealed winning sweepstakes prizes. The Point of Sale Terminal is connected to the Universal Point of Sale server which handles all transactions and connections with the Central Database. When a customer purchases cybertime a request is forwarded from the Point of Sale to the Universal Point of Sale server where it is credited to the customer's account in the Central Database. This sale of cybertime also triggers the System to give a customer promotional sweepstakes entries by associating them with the Customer's account *at the time of purchase.*

"28. *Computer Terminals.* The Computer Terminals are state-of-the art personal computers that are the primary access point for the services sold by the CyberCenter. The Computer Terminals are equipped with a suite of licensed commercial software applications (like Microsoft Office) that can be used by customers on the local computer and they allow broadband access to the Internet. The Computer Terminals have attached swipe card readers that provide customers access by swiping their account access cards. The Computer Terminals are connected to a server called the CyberCenter Kiosk Webservice ('Computer

Terminal server') that deducts cybertime from the customer's account as the customer uses access time at the Computer Terminal.

"29. *The Readers.* The Readers reveal sweepstakes entries. The Readers are designed to show sights and sounds that heighten the suspense and excitement of the sweepstakes. The Readers reveal the outcomes to the customers in groups. The Readers do not determine the outcome of the sweepstakes; rather, they merely reveal the outcome to the customer in an entertaining manner. The only random process that takes place on the Reader is the determination of which entertaining display to use to show a losing outcome or a winning outcome of equal value. For example, a Reader might have several hundred different ways of showing a non-winning sweepstakes outcome to the customer.

"30. *Servers.* The Point of Sale Terminals, Computer Terminals, and Readers are connected to three separate servers. The Universal Point of Sale server runs from the CyberCenter back office and handles requests from both the Point of Sale and Recharge Kiosks. The Universal Point of Sale server credits the customer's account in the database with cybertime when purchases are made at either the Point of Sale or the Recharge Kiosks and gives the customers sweepstakes entries. The Computer Terminal server also runs from the CyberCenter back office and controls access to the Computer Terminals. When a customer swipes an account access card at a Computer Terminal, the Computer Terminal server determines whether the customer has cybertime available. If so, the Computer Terminal server allows the customer access to the Computer

Terminal. The Computer Terminal server keeps a record of the cybertime available on the customer's account. The Reader server determines which of the customer's sweepstakes entries will be revealed on any given request. For example, if a customer makes a request at a Reader to reveal five sweepstakes entries and the customer has 100 available, the Reader server determines which five entries to reveal. The Reader server then sends the information on the five entries to the Reader and marks those five entries as revealed in the database.

"31. *Customer Tracking Terminal ('CTT').* The CTT provides a mechanism for entering the customer's account data into the System and issuing a customer account card. Customers new to the CyberCenter must sign up and get an account card to begin tracking cybertime. The CTT interfaces with the Customer Tracking System.

"32. *Customer Tracking System ('CTS').* The CTS provides an interface between the central database and the CTT. In addition to facilitating account creation and data entry, the CTS can be leveraged to facilitate promotions.

"33. *Recharge Kiosk.* The recharge kiosks are automated stations that allow existing customers with account access cards to *purchase additional cybertime and add it to their accounts.* If customers have won cash prizes in the sweepstakes, *they can use the Recharge Kiosks to [apply] those winnings towards additional cybertime purchases.* The Recharge Kiosks are connected to the Universal Point of Sale server.

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"34. *Management Terminal.* The management terminals allow users to monitor and control the system. They provide access to reports on how the System works and on the current state of the System. Management Terminals are personal computers running proprietary software that provides them with a means of requesting and displaying information from the Central Database. Customers who call in to determine the outcome of their sweepstakes entries will be serviced by employees of the CyberCenter through the Management Terminals. Management Terminals provide access to information from the database through their connection to the Management Terminal Service.

"35. *Management Terminal Service ('MTS').* The MTS connects the Management Terminals to the Central Database. The MTS packages requests for information from the Management Terminals and returns the data requested from the database. The MTS runs on a server in the back office of the CyberCenter."

(Emphasis added.)

In a nutshell, the MegaSweeps system functions as follows: A consumer wishing to play the readers opens an account by obtaining a magnetically encoded card, either by mail or at the point of sale at the race track. In either event, the account is simultaneously assigned, by the central database and a server, a number of MegaSweeps entries corresponding to the amount of cybertime the consumer obtained. The assignments are selected from any 1 of 20 pools containing 200 million entries in each pool. According to Clifton Lind, Multimedia's chief executive officer, the entries in each pool are "randomized by

chance" before they are assigned to a consumer. The consumer activates one of the 1,300 readers by inserting his slide card into a slot on the reader. Once activated, the reader allows a consumer to reveal his entries. The consumer chooses an option and presses a button. Subsequently, the reader server reveals the selected number of entries. Whether those entries correspond to any of the *winning* entries that were assigned to the consumer's account at the point of sale is determined by a computer algorithm. The consumer may continue selecting options until all of his entries have been revealed.

When the consumer "logs off" the reader, his account status is maintained in the central database. The system will print out a report of the transaction, including the amount of winnings, if any. Subsequently, the consumer may collect his winnings at a "cash advance cage." In the alternative, he may exchange his winnings for *more cybertime* and, consequently, additional MegaSweeps entries, by inserting his card into one of the recharge kiosks and entering the amount of his winnings to be applied toward the purchase of more cybertime.

Barber contends that the "readers are slot machines with certain parts removed." Barber's brief, at 48 n.12. Thus, he insists, the readers are illegal because they are "'readily adaptable or convertible' to slot machines" within the definition of § 13A-12-20(10). *Id.*

In its order, the trial court concluded that the readers are not slot machines because the "readers are 'dumb terminals,'" reasoning (1) that "no element of chance is present *at the readers,*" and (2) that "no consideration is paid or *can be paid* to use the readers." (Emphasis added.)

Barber, however, contends that *both* these elements are present if the components of the system are understood as working "collectively" and that "the trial court erred in looking *solely at the readers* to determine whether gambling devices were present." Barber's brief, at 47 (emphasis added).

With a payout percentage of 92%, the owners do not – and could not – argue that the *third* element of gambling is absent in this case, that is, they do not contend that *prizes are not being awarded.* Instead, echoing the rationale of the trial court, Innovative insists that because the winning entries are *predetermined within the central database* at the moment the "player receives his card," prizes are not awarded on the basis of a "future contingent event," within the meaning of § 13A-12-20(4). Innovative's brief, at 66. Thus, this case turns on whether the MegaSweeps involves the elements of chance and consideration.

2. Chance

By "chance," we mean "a lack of control over events or the absence of 'controllable causation' – 'the opposite of intention.'" *Opinion of the Justices No. 373,* 795 So. 2d 630, 635 (2001) (quoting *Black's Law Dictionary* 231 (6th ed. 1990)).

> "Slot machines have come a long way since Charles Fey invented the first nickel three-reeler in a small machine shop in San Francisco in 1895. . . . There are slot machines that have eliminated the handle, requiring only the pressing of a button to set the wheels spinning. Some slot machines don't even have slots; the number

> of times a player can pull the handle (or press the button) is displayed as replays in a window of the machine.
>
> "Charles Fey, if he were alive today, *would recognize all of these machines as refinements of his invention.*"

I. Nelson Rose, *Gambling and the Law* 83 (Gambling Times, Inc. 1986) (emphasis added). Today, "most slot machines in casinos are not manually operated. . . . " Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox,* 86 B.U.L. Rev. 371, 428-29 (2006). More and more, such machines are controlled by computer. *Id.* at 441, nn. 382 & 383. Indeed, modern slot machines may be "stand-alone *or network computers.*" Jeff Dense, *The Socioeconomic Impact of Gaming in the Virgin Islands,* 8 Gaming L. Rev. 175, 176-77 (2004) (emphasis added). Thus, a device is no less a slot machine because it operates within a *network,* that is, because it shares computer-processing equipment with a number of similar devices.

In that connection, Innovative states:

> "By [constructing its system so that] winning and losing entries [would be determined] *before the card is handed to the person* and by not charging any consideration for the entries themselves, Innovative designed the [MegaSweeps] so that [the] required statutory element[s] of 'gambling device' – something staked 'upon the outcome of a contest of chance or a future contingent event' – *would be missing.*"

Innovative's brief, at 12 (emphasis added). However, Barber and certain amici curiae argue that when a consumer obtains his or her card with the assigned MegaSweeps entries, "*chance occurs at [that] point of sale.*" The Foundation's brief, at 7 (emphasis added). We agree.

It is axiomatic that one may not lawfully do indirectly what is unlawful to be done directly. It is uncontroverted that at least some of the readers had been adapted for such use from their former function as stand-alone, or mechanical, slot machines. The adaptation was described by Robert Sertell, Sheriff Hale's expert witness, in the following colloquy:

> "Q. Now, did you see any [of the] readers on [January 4, 2006, that were seized by the sheriff in December]?
>
> ". . . .
>
> "A. [By Sertell]. There was one, sir, yes, sir.
>
> "Q. Did you take it apart?
>
> "A. Yes.
>
> "Q. And what did you see in it that was anything of note?
>
> A. The cabinet had a Bally Manufacturing name plate on the side.[4] The *internals of*

[4] Bally Manufacturing Company "is one of the oldest names in gaming, and was the dominant manufacturer of slot machines until [International Gaming Technology] took over that role in the 1980s." John Grochowski, *The Slot Machine Answer Book: How They Work, How They've Changed and How to Overcome the House Advantage* 68 (Bonus Books 2d ed. 2005).

> *the cabinet had been removed and replaced with what was apparently a computer or a personal computer unit.* There was provision inside for the bill-acceptor mechanism to be replaced if necessary. It was missing when I saw it. *There was, indeed, the traditional cash box still in place.* There was a ticket printer validator loaded still in place, that could have received and/or issued bar-coded tickets. That magazine was full. There was, I believe, a power supply in the cabinet and that is about it."

(Emphasis added.)

Significantly, the statutory definition of a slot machine includes any device that is "constructed or *readily adaptable or convertible to such use,*" regardless of whether it is "in working order or *[whether] some mechanical act of manipulation or repair is required to accomplish its adaptation, conversion or workability.*" § 13A-12-20(10) (emphasis added). Just as the readers were adapted to function within the computerized MegaSweeps network, they could be retooled to operate as they were originally designed.

In this case, the element of chance is satisfied at the point of sale – before the readers are activated – by the same central database and other computer equipment that serve to operate the readers. It is immaterial that the readers do not, themselves, assign values to the entries. In short, the element of chance is as much a feature of the MegaSweeps network system as of a stand-alone slot machine.

3. Consideration

Barber contends that the trial court erred in holding that the element of consideration was absent in the operation of the MegaSweeps system. Arguing to the contrary, the owners first insist that the only consideration paid by consumers is not for MegaSweeps entries, but for *cybertime,* which is sold at *fair market value.* The owners' argument, however, ignores the last sentence of § 13A-12-20(10): "Nor is it any less a slot machine because apart from its use or adaptability as such *it may also sell or deliver something of value on a basis other than chance.*" (Emphasis added.)

This portion of the statute deals with the recurring attempts by gaming interests to invest slot machines with legitimacy as ordinary vending machines. See, e.g., *Higdon v. McDuff,* 233 Ala. 497, 172 So. 636 (1937); *Skates v. Hartsfield,* 216 Ala. 618, 114 So. 10 (1927); *Cagle v. State,* 18 Ala. App. 553, 93 So. 206 (1922) (machine yielding either chewing gum or nickels upon the deposit of a nickel was an illegal slot machine); and *Painter v. State,* 163 Tenn. 627, 45 S.W.2d 46 (1932). "Slot machines were invented that dispensed almost worthless mints with every nickel played so the operator could say that the customer always received something for his money." Rose, *Gambling and the Law* 89. "The early courts were split on whether this converted the slot machine into a legitimate vending machine, *until it was pointed out that players continued to put in their nickels long after the mints had run out.*" *Id.* (emphasis added). Consequently, the statute impels us to inquire beyond the fact that the consumer always receives something for his money. It requires us to

consider the substance of the transaction, rather than its form.

Doing so accords with the general rule that "a slot machine which, in return for a coin deposited therein, dispenses merchandise represented to be of the value of such coin, accompanied at occasional and uncertain intervals by a varying amount of money . . . , or more broadly, one which provides an element of chance, is a gambling device." 38 Am. Jur. 2d *Gambling* § 104 (1999). Thus, "[w]here the return to the player is . . . dependent on an element of chance, a slot machine is a gambling device, *even though the player is assured of his money's worth of some commodity and hence cannot lose.*" *Id.* (emphasis added). Such inquiry is also consistent with Ala. Code 1975, § 8-1-150 ("All contracts founded in whole *or in part* on a gambling consideration are void."), and with this Court's "'"'general disposition'"'" in the gambling context to "'"'regard[] always the substance and not the semblance of things, *so as to prevent evasions of the law.*'"'" *Ex parte Ted's Game Enters.*, 893 So. 2d 376, 380 (Ala. 2004) (quoting *Opinion of the Justices No. 373*, 795 So. 2d 630, 640 (Ala. 2001), quoting in turn *Opinion of the Justices No. 277*, 397 So. 2d 546, 547 (Ala. 1981) (emphasis added in *Opinion No.* 373)).

To be sure, MegaSweeps "delivers something of value," namely, cybertime, on the basis of something "other than chance." Upon the tender of a minimum payment, consumers invariably receive four minutes of cybertime, in addition to 100 MegaSweeps entries. The owners contend that the consideration is paid *for the cybertime*, and, consequently, that the MegaSweeps entries are *free*. This argument does not pass statutory muster, however, if,

looking through the form of the operation to its substance, consumers are *paying for the entries, in whole or in part,* regardless of the cybertime acquired in conjunction with those entries. See § 13A-12-20(11) ("[*a*]*ny* money or property" paid or received is consideration). In other words, if they are paying to play the readers, rather than to acquire, *or in addition to acquiring,* cybertime, the element of consideration set forth in § 13A-12-20(10) and (11) is satisfied.

The evidence on this issue was undisputed or uncontroverted. The trial court found that "few customers were using the [Internet kiosks]," but that customers "were lined up at all hours to use the readers." Also, the fact that the owners provided more than 11 times as many readers as Internet kiosks suggests an expectation that the readers would be the major attraction.

Indeed, consumers purchased additional cybertime – with the accompanying entries – even though they already had large quantities of unused cybertime on their accounts. The recharge kiosks, which allowed consumers to apply their "winnings toward additional cybertime purchases," facilitated those transactions. In fact, consumers who purchased cybertime were apprised *only of the number of entries* credited to their account, not the amount of cybertime, unless they used the recharge kiosks or specifically asked MegaSweeps personnel about the cybertime.

The payout percentage is 92%. This percentage coincides with the industry standard for *casino-style slot machines,* which "typically pay back 90% to 98% of all money played, thus providing a hold for the house of 2% to 10%." Mark G. Tratos, *Gaming on the Internet,* 3 Stan. J.L.

Bus. & Fin. 101, 111 (1997). By contrast, the typical payout percentage for a "temporary promotional sweepstakes" is "one half of one percent." *Midwestern Enters., Inc. v. Stenehjem,* 625 N.W.2d 234, 240 (N.D. 2001). Moreover, the duration of "promotional sweepstakes occasionally offered by fast food chains, or in connection with candy, sodas, miscellaneous food or other established retail products," is typically "limited," Tenn. Op. Att'y Gen. No. 02-089 n.5 (August 21, 2002), as opposed to the duration of the MegaSweeps, which is *indefinite.* The payout percentage and duration of the operation are indicative of "the true purpose of the game." *Stenehjem,* 625 N.W.2d at 240.

Indeed, the trial court found it "obvious that most of the customers are more interested in getting [the] MegaSweeps entries than they are in using the [Internet kiosks]." The court further found that

> "the [owners] undertook [the MegaSweeps] to *attract customers who wanted to gamble, or, at least, those who could be made to think that they were gambling.* [The owners'] advertising through television commercials and billboards promoted playing [the] MegaSweeps *as an alternative to attending gambling establishments* at Greentrack, [Alabama,] or Philadelphia and Biloxi, Mississippi."

(Emphasis added.) These facts and findings refute the owners' argument that, because cybertime is sold at fair market value, the MegaSweeps operation falls outside the statutory definition of a slot machine. Clearly, a substantial number, if not the majority, of customers pay to play

the readers, rather than to acquire, or in addition to acquiring, cybertime.

The owners next contend that there is no consideration for the entries, because minimum quantities may be obtained by mail or at the point of sale *without charge.* However, this Court has held that the availability of free chances is not necessarily dispositive of whether the game is a gambling scheme. *Grimes v. State,* 235 Ala. 192, 178 So. 73 (1937).

Grimes involved a "bank-night" scheme – common during the depression era, Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 50 Hastings L.J. 771, 786 (1999) – in which, in order "[t]o promote business, theaters conducted drawings and made prizes available to patrons who bought tickets or, in some cases, to individuals who registered for the drawing but were *not required to buy a ticket.*" Roland J. Santoni, *An Introduction to Nebraska Gaming Law,* 29 Creighton L. Rev. 1123, 1131 (1996) (emphasis added). Consistent with this practice, the operators of the Ritz Theater in Tuscaloosa held a drawing each Thursday night for a cash prize. *Grimes v. State,* 28 Ala. App. 4, 178 So. 69 (1937) (setting forth the underlying facts). "A registration booth was maintained during all hours of each day of the week in the marquee of the theater, where registration cards could be signed" by individuals wishing to participate in the drawing. 28 Ala. App. at 5, 178 So. at 69. Stubs of all such cards were placed in a "hopper" and made up the pot from which each drawing was taken. 28 Ala. App. at 6, 178 So. at 70. *"[N]o charge of any kind was made or any consideration exacted from any one, and the signing of such card was absolutely free, no one being required to purchase a ticket*

of admission to register." 28 Ala. App. at 5, 178 So. at 69 (emphasis added).

> "In addition to the original registration card, [however,] those patrons of the theater *who attended a [matinee] performance* of the theater prior to the hour of the drawing on the day of the drawing, viz., Thursday of each week, were permitted, if they so desired, to sign *an additional card* ['the matinee card'] other than the registration card. . . . "

28 Ala. App. at 6, 178 So. at 70 (emphasis added). Prizes were awarded *only to persons who had signed the matinee card,* unless the person whose name was drawn was present on the premises and *stepped forward within two minutes* to claim his prize. 28 Ala. App. at 6, 178 So. at 70.

Cecil B. Grimes, as "city manager of the . . . [Tuscaloosa] theaters," was "convicted of conducting a lottery." 28 Ala. at 5, 178 So. at 69. The Court of Appeals affirmed the conviction, and Grimes sought certiorari review, which this Court denied with a written opinion. 235 Ala. at 192, 178 So. at 73.

The only issue presented to this Court was whether the element of *consideration* was satisfied, where "everybody [could] register, and [could] participate in the drawing by being either in the theater, or on the outside, in position to appear and claim the prize within two minutes." 235 Ala. at 193, 178 So. at 74. The Court inquired: "How can it be said patrons . . . have paid anything for a chance, if they have a like chance without paying?" *Id.*

Holding that the element was satisfied, however, the Court focused on the *recipient* of the consideration, that is,

"[was] there a consideration *moving to him*?" 235 Ala. at 193, 178 So. 2d at 74. Thus, the Court reasoned that "the lure of bank night [was] the show, *and* the chance for a prize, as against the chance *without the show.*" 235 Ala. at 193-94, 178 So. at 74 (emphasis added). "[L]ooking through form and dealing with reality," the Court recognized that "the plan [was] intended to fill the theater, not the lobby outside," and that "the success of the plan in swelling the patronage, and consequent income through the scheme of chance [was] the final proof of a consideration paid and a consideration received." 235 Ala. at 194, 178 So. at 74.

Finally, the Court stated:

> "That the prize may go to some one who has paid nothing *does not negative the fact that many have paid* for their chance. *Because some have not been drawn into the gambling phase does not render it any the less a lottery,* with whatever of evil it engenders, *as to the large public who have paid.*"

235 Ala. at 194, 178 So. at 74 (emphasis added). *Grimes* thus stands for the proposition that the opportunity for free plays does not a negate the element of consideration, or obviate an inquiry into the purpose and effect of the operation as "the final proof of . . . consideration." See also *Clark v. State,* 262 Ala. 462, 462, 80 So. 2d 312, 312 (1955) (the purpose and effect of the operation is a factor in deciding whether "consideration [is] *moving to the operator*").

In support of their argument that the opportunity for free plays negates the element of consideration, the owners cite *Pepsi Cola Bottling Co. of Luverne v. Coca-Cola Bottling* Co., 534 So. 2d 295 (Ala. 1988) ("*Pepsi*

Cola"), a short, per curiam opinion holding that an "'Instant Cash' promotion," operated by Pepsi Cola Bottling Co. of Luverne, Inc. ("Pepsi"), did not constitute a lottery. 534 So. 2d at 296. The promotion "offered a prize of $10,000 to someone presenting [bottle] caps containing all the letters" spelling "'Pepsi Instant Cash.'" *Id.* "For [that] campaign, Pepsi distributed 25,000 cards with a similar opportunity at participating stores and advertised via store displays and radio that no purchase was required to participate in the game. Cards could also be obtained by telephone request and by writing the bottling plant or production center in Columbus, Georgia." 534 So. 2d at 296. In holding as it did, the Court did not discuss, overrule, or attempt to distinguish *Grimes.* It merely stated that "the 'Pepsi Instant Cash' game [was] not a lottery, because participants were not required to purchase cards in order to play." 534 So. 2d at 297.

We need not decide whether *Pepsi Cola* conflicts with *Grimes,* because it is distinguishable from *this* case in at least two important respects. First, unlike the sweepstakes in *Pepsi Cola*, MegaSweeps is a permanent, high-stakes game. "[I]t does not follow that simply because low-stakes, temporary promotional sweepstakes with pay-out rates of one-half of one percent that offer free play are not pursued as lotteries, we must conclude high-stakes, permanent games with pay-out rates of [ninety-two] percent are immune from the definition of [gambling]. . . ." *Midwestern Enters., Inc. v. Stenehjem,* 625 N.W.2d at 240 ("Lucky Strike" machine, which dispensed a "two-minute pre-paid phone card" in addition to a "game piece giving the buyer a chance to win up to $500 in cash," having a payout percentage of 65%, was an illegal gambling device,

despite a limited opportunity to play the machine for free). Second – and more fundamentally – *Pepsi Cola*, unlike this case, did not involve the use of an alleged gambling *device*. The facts in *Pepsi Cola* did not require, or invite, an analysis of § 13A-12-27 and § 13A-12-20(10) and (11). In particular, there was no allegation, like the one here, that the game involved the use of a slot machine. Thus, *Pepsi Cola* is inapposite.

We think "Charles Fey, [inventor of the slot machine,] if he were alive today, would recognize [the accessorized MegaSweeps readers] as refinements of his invention." Rose, at 83. Innovative conceded that it constructed its system "so that [the] required statutory element[s] of [a] 'gambling device' – something staked 'upon the outcome of a contest of chance or a future contingent event' – *would be missing*." Innovative's brief, at 12 (emphasis added). The flaw in Innovative's approach is that the elements are not "missing" from the mechanics of the scheme. They are simply *dispersed* throughout the various units and processes of the integrated network.

The owners propose that they have found, and exploited, a "loophole" in the law. Indeed, the trial court stated:

> "The evidence convinces the court that *through careful planning the [owners] have found a loophole in the patchwork of Alabama's anti-gambling laws and they have taken advantage of that loophole.* In the words of the Sheriff's expert witness, Robert Sertell, the [owners'] sweepstakes promotion was 'trying to pull a tractor-trailer through a loophole.' This court agrees that the [owners] have taken advantage of weaknesses in the law. . . . "

(Emphasis added.) Alabama's gambling law, however, is not so easily evaded. It is "'the policy of the constitution and laws of Alabama [to prohibit] the vicious system of lottery schemes and the evil practice of gaming, in *all their protean shapes.*'" *Opinion of the Justices No. 83,* 249 Ala. 516, 517, 31 So. 2d 753, 754 (1947) (quoting *Johnson v. State,* 83 Ala. 65, 67, 3 So. 790, 791 (1887) (emphasis added)). In the computer age, the fact that *chance* takes place at the point of sale rather than at the readers themselves is simply inconsequential.

Thus, the readers are slot machines *as to those who pay to play them.* Are they any less so because a few patrons play for free? We think not. "Because some have not been drawn into the gambling phase does not render it any the less [a slot machine], with whatever of evil it engenders, as to the large public who *have* paid." *Grimes,* 235 Ala. at 194, 178 So. at 74 (emphasis added). Gratuitous entries obtained by mail or at the race track do not legitimize the high-stakes MegaSweeps any more than some opportunity for free plays could render innocuous a conventional slot machine. The trial court's contrary holding was, therefore, error.[5]

C. Vagueness

The JCRA challenges the statutory definition of gambling as unconstitutional as applied to this particular case. Because the trial court held in favor of the owners on their substantive claims, it did not address the JCRA's

[5] Our conclusion that the accessorized readers are slot machines renders unnecessary any discussion of whether they are also a lottery.

constitutional arguments. More specifically, the trial court stated:

> "The [owners] have . . . argued that the relevant statutes, Ala. Code (1975) Section 13A-12-20 *et seq.*, are unconstitutional as applied to this case because of vagueness. . . . The argument may have merit, but because of the conclusion reached by the court that the plaintiffs' promotional scheme is lawful, the constitutional issue need not be addressed."

Because we disagree with the trial court as to the legality of the MegaSweeps operation, the constitutional issue is squarely before us, and we address JCRA's vagueness challenge.

"In reviewing the constitutionality of a statute, we 'approach the question with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of the government.'" *Moore v. Mobile Infirmary Ass'n,* 592 So. 2d 156, 159 (1991) (quoting *Alabama State Fed'n of Labor v. McAdory,* 246 Ala. 1, 9, 18 So. 2d 810, 815 (1944)). Overcoming that presumption is a heavy burden, which is borne by the party challenging the validity of the statute. *Densmore v. Jefferson County,* 813 So. 2d 844, 856 (Ala. 2001); *Jefferson County Bd. of Health v. City of Bessemer,* 293 Ala. 237, 301 So. 2d 551 (1974).

The JCRA specifically challenges only § 13A-12-20(4), which provides, in pertinent part:

> "A person engages in gambling if he stakes or risks *something of value* [consideration] upon the outcome of a contest of *chance* or a future

> contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome."

(Emphasis added.) The essence of the JCRA's argument, as we understand it, is that if this Court holds that the elements of *chance* and *consideration* are present in the MegaSweeps system, those terms are unconstitutionally vague. We disagree.

"Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales,* 527 U.S. 41, 56 (1999). However, "'[m]ere difficulty of ascertaining its meaning or the fact that it is susceptible of different interpretations will not render a statute . . . too vague or uncertain to be enforced.'" *Scott & Scott, Inc. v. City of Mountain Brook,* 844 So. 2d 577, 589 (Ala. 2002) (quoting *City of Birmingham v. Samford,* 274 Ala. 367, 372, 149 So. 2d 271, 275 (1963)). "[F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions." *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 340 (1952). "Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that *one who deliberately goes perilously close to an area of proscribed conduct shall take*

the risk that he may cross the line." Id. (footnote omitted; emphasis added).

Moreover, "[a] statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the *common law, dictionaries,* treatises or even the words themselves, if they possess a *common and generally accepted meaning." Bowers v. State,* 283 Md. 115, 125, 389 A.2d 341, 347 (1978) (emphasis added).

The JCRA does not allege that the meanings of the words "chance" and "consideration" are mysterious or new. Actually, "[g]ambling is as old as man, and certainly as old as the common law." Rose, at 75. The elements of gambling under § 13A-12-20(4) are the same as those at *common law,* namely, the payment of (1) consideration, for the (2) chance to win (3) a prize. See *Grimes v. State,* 235 Ala. at 193, 178 So. at 74; Kyle D. Craddock, *The Cardstock Chase, Trading Cards: A Legal Lottery?* 8 Gaming L. Rev. 310, 314 (2004) (the "three basic [common-law] elements of gambling [are] consideration, chance, and prize"). Thus, the meanings of the words "chance" and "consideration" are easily apprehended by reference to "judicial determinations [and] the common law," at which they "possess a common and generally accepted meaning." *Bowers v. State,* 283 Md. at 125, 389 A.2d at 347. Moreover, the element of consideration in the specific context of this case is meticulously defined in § 13A-12-20(11).

In that connection, the amicus curiae brief filed by the Attorney General contends that there is no "vagueness," and "no confusion about what the law requires," the only issue being one of fact, that is, how the MegaSweeps

functions. Brief of Attorney General, at 10. Indeed, this case turns not so much on the *definitions* of "chance" and "consideration" as on their applications to the undisputed facts.

In the final analysis, Innovative created a system composed of what were formerly slot machines, which look like, sound like, and and attract the same class of customers as conventional slot machines, and, when integrated with the servers, serve essentially the same function as did the slot machines. In a carefully planned venture, Innovative transferred the element of chance from the readers to a server, merged the MegaSweeps entries with cybertime, and staked the success of itε venture on the legal efficacy of the transfer and merger. The owners have identified neither statutory law nor caselaw suggesting that such displacement and merger are legally significant. Having "take[n] the risk that" their venture "may cross the line," it is not "unfair to require" that the owners bear the consequences of failure. Consequently, the JCRA has not demonstrated that the statutory scheme is unconstitutional.

III. Case No. 1050625

Our resolution of the issues in case no. 1050857 necessarily resolves the issues in case no. 1050625. Therefore, the appeal in case no. 1050625 is dismissed as moot.

IV. Summary

In summary, the trial court erred in focusing on the function of the MegaSweeps readers in isolation. When integrated as they are with the servers, central database,

and related computer equipment, the readers are slot machines as that term is defined by § 13A-12-20(10) and § 13A-12-27. Moreover, § 13A-12-20 is not unconstitutionally vague. For these reasons, the judgment in favor of the owners is reversed and a judgment is rendered in favor of Barber.

1050625 – APPEAL DISMISSED.

1050857 – REVERSED AND JUDGMENT RENDERED.

See, Lyons, Harwood, Stuart, Smith, Bolin, and Parker, JJ., concur.

Stuart, Smith, and Bolin, JJ., file statements of nonrecusal.

STUART, Justice (statement of nonrecusal).

Jefferson County Racing Association, Inc., d/b/a the Birmingham Race Course (hereinafter referred to as "JCRA"), has moved for my recusal in these appeals. In its motion the JCRA alleges:

> "1. Justice Stuart is currently engaged in a political campaign for re-election to the office of Justice of the Alabama Supreme Court.
>
> "2. Justice Stuart has publically indicated that she opposes the 'establishment of gambling.' The recently released Christian Action Alabama 2006 General Election Voter Guide reflects that Justice Stuart 'agrees' on the issue of 'oppose establishment of gambling'. . . .
>
> ". . . .

"6. Justice Stuart has taken a political and ethical posture against gambling, has made her views public and has made her anti-gambling position a basis of why she should be re-elected a Justice of the Alabama Supreme Court. This stance is indicative of a bias that could squarely impact the parties, interests, and issues in these appeals.

"7. . . . [T]he core issue of the above-referenced cases concerns whether certain . . . business activities constitute unlawful gambling or a lawful sweepstakes operation.

". . . .

"13. A judge or justice must be a neutral decision maker and not an advocate. The issue presented by this motion is not about political speech. It is about a stated and demonstrated actual bias and prejudice to a participant and an issue in a legal case before this Court.

". . . .

"Therefore, it is clear that the Canons of Judicial Ethics mandate that a justice cannot sit on a case involving the issue of whether certain activities constitute unlawful gambling or a lawful sweepstakes operation when one of her political campaign platforms is against gambling. Justice Stuart must disqualify/recuse herself from the above-styled cases."

Innovative Sweepstakes Systems, Inc., has also moved for my recusal in these appeals on the same grounds.

Appendix A

Canon 3.C., Ala. Canons of Jud. Ethics, provides:

> "(1) A judge should disqualify [her]self in a proceeding in which [her] disqualification is required by law or [her] impartiality might reasonably be questioned, including but not limited to instances where:
>
> > "(a) [She] has *a personal bias or prejudice concerning a party*. . . ."

Judges are required to make decisions based on the application of the law to the facts, despite their personal opinions.

> "A judge's views on matters of law and policy ordinarily are not legitimate grounds for recusal, even if such views are strongly held. *See* Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 10.2 (1996) (collecting cases). After all, judges commonly come to a case with personal views on the underlying subject matter. . . . Far from necessarily warranting recusal, typically such views merely mark an active mind. See *Laird v. Tatum,* 409 U.S. 824, 835, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972) ('Proof that a [judge's] mind . . . was a complete tabula rasa . . . would be evidence of lack of qualification, not lack of bias.'); John Leubsdorf, *Theories of Judging and Judge Disqualification,* 62 N.Y.U. L. Rev. 237, 250-51 (1987) (discussing Judge Jerome Frank's statement that '[i]f . . . bias and partiality be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will')."

United States v. Snyder, 235 F.3d 42, 48 (1st Cir. 2000).

I have personal opinions about many issues. As a trial court judge I made, and as a Supreme Court Justice I now make, my decision in a case based on the application of the law to the facts in that particular case, regardless of my personal opinion. I have always done so, and I will continue to do so.

Because my personal opinions do not influence my decisions as a Justice of this Court, I decline to recuse myself.

Smith, J., concurs.

SMITH, Justice (statement of nonrecusal).

Jefferson County Racing Association, Inc., d/b/a the Birmingham Race Course, and Innovative Sweepstakes Systems, Inc., have filed motions seeking my recusal in these consolidated appeals. For the reasons expressed by Justice Stuart and by Justice Bolin in their statements of nonrecusal, I also decline to recuse myself.

I write separately to emphasize that I have a constitutional duty to decide cases, and that duty is balanced with the requirement of impartiality.

> "The Constitution of the United States and the Constitution of Alabama of 1901 impose on judges the duty to decide cases. See U.S. Const. art. III, § 1 (vesting the 'judicial Power of the United States . . . in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish'); *id.* at art. VI ('[A]ll . . . judicial Officers, both of the United States and of the several States, shall be bound

by Oath or Affirmation, to support this Constitution. . . . '); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995) ('Article III establishes a "judicial department" with the "province and *duty*" . . . to *decide* . . . "case[s]." ') (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803) (emphasis added)); *Marbury*, 5 U.S. at 180 (stating that a judge's oath to support the Constitution requires that he exercise the judicial power and decide cases in a manner consistent with fundamental law); *Pierson v. Ray*, 386 U.S. 547, 554, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) ('It is a judge's duty to decide all cases within his jurisdiction. . . . '); Ala. Const. 1901 amend. 328, § 6.01(a) ('[T]he judicial power of the state shall be vested exclusively in a unified judicial system which shall consist of a supreme court. . . . '); *id.* at § 279 (requiring 'all officers, executive and judicial, . . . [to] take the following oath or affirmation: "I, _____, solemnly swear . . . that I will support the Constitution of the United States, and the Constitution of the State of Alabama . . . and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter" '); *Federated Guaranty Life Ins. Co. v. Bragg*, 393 So. 2d 1386, 1389 (Ala. 1981) ('"[I]t is the duty of the judge to adjudicate the decisive issues involved in the controversy . . . and to make binding declarations concerning such issues, thus putting the controversy to rest. . . . " ') (citation omitted)."

Dunlop Tire Corp. v. Allen, 725 So. 2d 960, 976 (Ala. 1998) (See, J., statement of nonrecusal).

Stuart, J., concurs.

Appendix A

BOLIN, Justice (statement of nonrecusal).

Innovative Sweepstakes Systems, Inc., and the Jefferson County Racing Association, Inc., have each filed a motion seeking my recusal in these appeals because a Christian Coalition voter guide for the 2004 election indicated my agreement with the Christian Coalition on the issue of gambling, in that I was shown as agreeing next to the phrase "oppose establishment of gambling."

In *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), the United States Supreme Court addressed the issue whether a judicial candidate's First Amendment rights were violated by a canon of the Minnesota Code of Judicial Conduct that prohibited him from announcing his views on disputed legal or political issues. The Supreme Court held that this prohibition, known as the "announce clause," did violate the First Amendment rights of judicial candidates.

Thus, the United States Supreme Court has ruled that a judicial candidate's First Amendment rights permit the candidate either to announce or discuss or to refuse to announce or discuss personal views on an issue such as gambling. Each individual candidate is therefore constitutionally permitted to express his or her views in a manner that allows those views to be disseminated to the citizenry – in this case, answers in response to specific questions on a questionnaire.

White teaches that judicial candidates may respond to questions such as those that were asked in the 2004 Christian Coalition voter guide. I note that the Alabama Judicial Inquiry Commission, following the United States Supreme Court's release of *White,* withdrew an advisory

opinion in which it had opined that a judicial candidate would be violating the Alabama Canons of Judicial Ethics if the candidate answered certain questions on a questionnaire issued by the Christian Coalition in anticipation of the 2000 elections. See *Christian Coalition of Alabama v. Cole,* 355 F.3d 1288 (11th Cir. 2004). The withdrawal of this advisory opinion was in keeping with *White* and reflected the Judicial Inquiry Commission's view that answers to questions such as those in the Christian Coalition questionnaire were permissible free speech.

The question then arises as to whether answering such questions would violate Canon 3.C.(1), Ala. Canons of Jud. Ethics, which provides:

> "(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > "(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . . "

In this proceeding, I have no knowledge whatsoever of any disputed evidentiary facts not disclosed in the record nor any bias or prejudice either for or against any party, and there were no allegations in the recusal motion that I had such knowledge or bias. The only remaining issue is whether there is anything else by which my "impartiality might reasonably be questioned."

All judges are presumed to be qualified and unbiased. *Gary v. Crouch,* 867 So. 2d 310 (Ala. 2003). The burden of

proof is on the party making a motion to disqualify or recuse to establish that the judge whose disqualification or recusal is sought is biased or prejudiced against a party. *Ex parte Monsanto Co.*, 862 So. 2d 595 (Ala. 2003). In 2004, I expressed the view that I "oppose the establishment of gambling." My position on that issue is consistent with the law of Alabama; gambling is illegal in this State. I also oppose other acts that violate the laws of the State of Alabama, such as murder, rape, and robbery, but my personal opposition to the above acts does not prevent me from fairly and unbiasedly participating in cases involving such acts.

The main opinion in this case strictly applies the law as it exists in the State of Alabama to the facts that are before the Court. The opinion contains no bias or prejudice in favor of or against gambling, and I brought no bias or prejudice to my participation in it. Furthermore, the movants' position in the present case is that their activities *do not constitute gambling* but instead constitute a promotional sweepstakes. Therefore, there is an inherent inconsistency in the movants' argument that I should recuse myself from this case because I have indicated an opposition to the legal establishment of gambling and their argument on appeal that their enterprise is not gambling at all.

After due consideration, I decline to recuse myself.

Stuart and Smith, JJ., concur.

Appendix B

APPENDIX B – ORDER OF THE ALABAMA SUPREME COURT FILED DECEMBER 1, 2006

[LOGO] **IN THE SUPREME COURT OF ALABAMA**

December 1, 2006

1050625

David Barber, in his capacity as District Attorney for the Tenth Judicial Circuit of Alabama v. Jefferson County Racing Association, Inc., d/b/a the Birmingham Race Course; and Innovative Sweepstakes Systems, Inc. (Appeal from Jefferson Circuit Court: CV-05-7684)

1050857

David Barber, in his capacity as District Attorney for the Tenth Judicial Circuit of Alabama v. Jefferson County Racing Association, Inc., d/b/a the Birmingham Race Course, and Innovative Sweepstakes Systems, Inc. (Appeal from Jefferson Circuit Court: CV-05-7684)

ORDER

The appellees' motions for the recusals of Justice Lyn Stuart, Justice Patricia Smith, and Justice Mike Bolin having been submitted to those Justices;

And Justice Stuart, Justice Smith, and Justice Bolin having declined to recuse themselves;

And the appellees' motion for an order directing Justice Stuart, Justice Smith, and Justice Bolin to recuse themselves having been submitted to and considered by this Court;

Appendix B

IT IS ORDERED THAT the motion for an order directing Justice Lyn Stuart, Justice Patricia Smith, and Justice Mike Bolin to recuse themselves in the above-referenced appeals is denied.

Done this the 1st day of December, 2006.

See, Lyons, Harwood, Woodall, and Parker, JJ., concur.

APPENDIX C – ORDER OF THE ALABAMA SUPREME COURT FILED OCTOBER 24, 2006

[LOGO] **IN THE SUPREME COURT OF ALABAMA**

October 24, 2006

1050625
David Barber, as District Attorney of Jefferson County, Alabama v. Jefferson County Racing Association, Inc. d/b/a The Birmingham Race Course et al. (Appeal from Jefferson Circuit Court: CV-05-7684)

1050857
David Barber, in his capacity as District Attorney for the Tenth Judicial Circuit of Alabama v. Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course; Mike Hale; and Innovative Sweepstakes Systems, Inc. (Appeal from Jefferson Circuit Court: CV-05-7684).

NOTICE

Pursuant to Rule 34(a), Alabama Rules of Appellate Procedure, the request for oral argument is denied. These appeals are submitted on briefs October 24, 2006.

cc:
Hon. J. Scott Vowell, Circuit Judge
Marc J. Ayers, Attorney
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Appendix C

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Kenneth D. Wallis, III, Attorney

APPENDIX D – ORDER AND JUDGMENT OF THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA FILED JANUARY 31, 2006

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA CIVIL DIVISION

JEFFERSON COUNTY RACING ASSOCIATION, INC. d/b/a THE BIRMINGHAM RACE COURSE, and INNOVATIVE SWEEPSTAKES SYSTEMS, INC.	)	
PLAINTIFFS,	)	**CIVIL ACTION NO CV 05-7684 JSV**
v.	)	
MIKE HALE, IN HIS OFFICIAL CAPACITY AS SHERIFF OF JEFFERSON COUNTY, ALABAMA,	)	
DEFENDANT.	)	

DECLARATORY JUDGMENT AND INJUNCTION

(Filed Jan. 31, 2006)

I.
THE CASE

This action was brought by the plaintiff, the Jefferson County Racing Association, Inc., d/b/a the Birmingham Race Course (the Race Course), whose primary business activity is pari-mutuel wagering on live and simulcast greyhound racing and on simulcast horse racing at the Race Course facility located in the eastern area of Birmingham. This entity has been referred to as Milton McGregor's company. The intervenor, who has been aligned by the court as a plaintiff, is Innovative Sweepstakes

Systems, Inc., (Innovative), the owner of the gaming equipment which is at the center of this litigation. Innovative is a wholly owned subsidiary of Multimedia Games, Inc., (Multimedia), a publicly traded company, which provides computer equipment and software to promote gaming activities. The defendant is Mike Hale, in his official capacity as Sheriff of Jefferson County, Alabama.[1]

It is undisputed that the Race Course's pari-mutuel wagering is legal under current Alabama law, but on December 15, 2005, the Race Course opened a "CyberCenter" and began an activity it called "Quincy's Sweepstakes." After six days of operation, deputies of the Jefferson County Sheriffs Department obtained a search warrant and, on December 22, 2005, raided the facility. They began seizing the equipment used to operate the Sweepstakes on the grounds that the Sweepstakes constituted an illegal lottery or gambling scheme.

While the raid was progressing, the Race Course filed this action and sought a temporary restraining order to require the Sheriff to cease and desist the seizure, alleging that the Sweepstakes was a legal sweepstakes promotion under Alabama law. This court conducted an expedited hearing on the application for a T.R.O. and by agreement of the parties issued a preliminary injunction to preserve the status quo and to allow the parties to brief and prepare their case for trial. The court also suspended further operation of the Sweepstakes until the merits of the case

---

[1] Pursuant to Ala. Code (1975) § 6-6-227, the Alabama Attorney General received notice of the plaintiffs' case including the constitutional challenge to the relevant statute. The court allowed the Jefferson County District Attorney to intervene.

could be considered. Because of the intervening holidays, the case was set for trial on January 3, 2006.

On January 3, 2006 the court again heard arguments of counsel and the Sheriff agreed that he no longer required physical possession of the seized equipment. Therefore, the equipment was ordered to be returned to the Race Course and the disputed issue of responsibility for payment of the moving expenses was reserved by the court. The parties jointly requested additional time to try to narrow the disputed issues of fact and former Supreme Court Justice Ralph Cook agreed to facilitate their negotiations. The trial was continued for two weeks.

The court conducted a bench trial on January 17 and 18, 2006, and the stipulated facts were submitted as Joint Exhibit Number 1. As a result, there are few remaining issues of disputed fact.

II.
THE ISSUE

The fundamental issue this Court must decide is the legality of the Sweepstakes. The Sheriff contends that the Sweepstakes promotion at the Race Course facility constitutes an unlawful lottery and/or gambling scheme under Alabama law. The Sheriff asserts that the CyberCenter being promoted by the Race Course is a "sham," and that patrons are actually paying consideration for sweepstakes entries.

On the other side, the plaintiffs deny that the CyberCenter is a sham and contend that the Sweepstakes is a lawful sweepstakes promotion under Alabama law because

no consideration is required to participate in the Sweepstakes. Plaintiffs also deny that the operation involves gambling or gambling devices. Plaintiffs assert that the Sweepstakes is a promotional plan designed to attract patrons to the Race Course facility, to promote the Cyber-Center, and to enhance the pari-mutuel activities, thereby increasing income. Plaintiffs further contend that the Alabama gambling statutes are unconstitutionally vague as applied to the facts of this case.

II.
THE FACTS

In 2005 the Race Course engaged Multimedia to develop a sweepstakes promotion as part of a marketing plan to promote the Race Course. During the development process, both the Race Course and Multimedia sought opinions from those it considered to be experts in the area of sweepstakes promotions to help them determine whether or not their proposed operation complied with applicable Alabama law.

On May 25, 2005 plaintiffs demonstrated the Sweepstakes operation to the Alabama Attorney General's office. After seeing the demonstration and being furnished with additional requested documentation, the Attorney General's office advised the plaintiffs that sweepstakes promotions are legal in Alabama and that the promotion would be lawful if the Sweepstakes were operated as demonstrated. The Attorney General's office informed the

plaintiffs that they would give the same opinion if other law enforcement agencies were to inquire.[2]

The stipulations also reflect that representatives of the plaintiff had discussions with the Sheriff and the District Attorney and offered to demonstrate the Sweepstakes to them prior to beginning operations. The plaintiffs proceeded with the promotion plans and the Race Course's Sweepstakes began on December 15, 2005.

During the trial the court was given a courtroom demonstration of the Sweepstakes at the Race Course.

To play the Sweepstakes at the Race Course, a patron must first open an account to obtain a plastic account access card containing an encoded magnetic strip similar to that on a credit card. To open an account the customer presents his/her driver's license to a Race Course attendant who scans the license into the Race Track's computer system. The patron then receives the access card at no charge as well as an individual account number similar to a PIN. Plaintiffs call the card a "Qcard."

After obtaining the Qcard, the patron moves to a Point of Sale Terminal where he/she may purchase Internet time (cybertime). The sale of cybertime also triggers the system to give the customer promotional Sweepstakes entries. For

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[2] Stipulation #41. The Sheriff subpoenaed Troy King, the Alabama Attorney General, to testify at the trial but King immediately filed a motion to quash the subpoena. He also filed a petition for a writ of mandamus in the Alabama Supreme Court requesting that court to stay the trial until the motion to quash could be considered. On the morning of the trial, this court granted King's motion to quash the subpoena and the case proceeded to trial.

each $1.00 spent the patron receives four minutes of Internet time and is given 100 MegaSweeps entries, each of which represents a separate chance to win a cash prize. The rate charged for access to the CyberCenter is comparable to rates charged by providers of similar computer services and is "fair market value." There is no separate charge for the Sweepstakes entries.

In the CyberCenter there are 116 state-of-the-art computers. The customer swipes his/her Qcard and logs onto a computer that tracks the amount of Internet time available to the customer, deducting the used time from the customer's account. The computers provide the customers with broadband Internet connections allowing the user to browse the Internet, to access email and to obtain many of those services that are available on the Internet. The CyberCenter can also be used to make telephone calls via the Internet, to make copies, to print digital photographs, to send faxes, and so forth. The computers can be used to gain access to online information about greyhound and horse races and the customer can access pari-mutuel tip sheets and other information used for handicapping live and simulcast racing sites around the country.

As stated, when the customer buys Internet time he/she also gets Sweepstakes entries in Quincy's MegaSweeps. Whether or not the customer has a winning or losing entry is predetermined at the time the customer purchases Internet time. Once the customer has been given the Sweepstakes entry, it cannot be changed and the customer cannot tell by looking at the card whether he/she has drawn a winning entry. The customer may determine whether the Sweepstakes entries are winners or losers at the CyberCenter, by accessing a website remotely, by

calling a toll-free telephone number, or by going to an electronic Reader.

The most popular way to learn the result of an entry is through the use of the more than 1,300 electronic Readers that display winning and losing entries. To learn the result of an entry from a Reader, the customer swipes his Qcard to activate the Reader and then presses a button on the Reader to see the results. The customer may select one entry or a batch of entries to be read at the same time.

The demonstration and other evidence makes it clear to the court that these Readers are designed and arranged so that they look and sound like slot machines at a gambling casino. But while they look, sound and act like a gambling machine, the evidence shows that they are not gambling machines. These machines do not determine who wins or who loses. There is no chance involved. The Reader simply reads and displays the results of the predetermined sweepstakes entries. As plaintiff contends, these Readers are "dumb terminals" that only read the electronic entries.

Another machine demonstrated as part of the promotion was the Recharger Kiosk, located near the Readers. This is an automated station that allows the card holder to purchase additional cybertime and to add cybertime to his/her account. If the patron has won a cash prize in the MegaSweeps, he/she can go to the Recharger and use those winnings to purchase additional cybertime. Of course the customer also gets additional MegaSweeps entries when he/she purchases more cybertime.

The evidence shows that during the brief period the plaintiffs were operating the promotion, few customers

were using the CyberCenter; however they were lined up at all hours to use the Readers. It is obvious that most of the customers are more interested in getting MegaSweeps entries than they are in using the CyberCenter. This court has no way of knowing whether the customers think they are playing real slot machines or whether they are aware that the Readers simply look like slot machines.

The evidence also shows that there are methods under the rules adopted by the Jefferson County Racing Commission, by which a customer can obtain a free Sweepstakes entry without making a purchase of cybertime. The customer can request and receive a free entry in the Sweepstakes by mail. There was also evidence that the plaintiffs plan to offer some MegaSweeps entries to patrons at the Race Course even if they do not buy cybertime.

Once the results of the entries have been read by the Reader the customer's account is updated. When the customer decides to "cash in," the customer is paid cash for the winning entries by a cashier.

IV.
THE LAW

A.
LOTTERIES

Lotteries are prohibited in Alabama. The Alabama Constitution of 1901 provides:

> "§ **65. LOTTERIES; PROHIBITED**
> "The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state

> of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; and all acts, or parts of acts heretofore passed by the legislature of this state, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided." Ala. Const. Art. IV § 65 (1901).

The Supreme Court has stated that "the broad conception set forth in § 65 showing that the prohibition is not only against lotteries but also against any scheme in the nature of a lottery. The very purpose of this broad declaration was to put a ban on any effort at evasion or subterfuge." *Opinion of the Justices No. 83*, 31 So. 2d 753, 755 (Ala. 1947).

The Alabama Legislature has specifically defined the term "lottery:"

> "**(6) LOTTERY OR POLICY.** An unlawful gambling scheme in which:
>
> "a. The players pay or agree to *pay something of value for chances,* represented and differentiated by numbers or by combinations of numbers or by some other medium, one or more of which chances are to be designated by the winning ones; and
>
> "b. The winning chances are to be determined by a drawing or by some other fortuitous method; and
>
> "c. The holders of the winning chances are to receive something of value." Ala. Code (1975) § 13A-12-20(6) (1975) (emphasis added).

Appendix D

B.
GAMBLING AND GAMBLING DEVICES

The promotion of gambling or the possession of a gambling device is also unlawful under Alabama law. Ala. Code (1975) §§ 13A-12-22 and 27. The Code of Alabama defines "gambling" and "gambling device" in relevant part as follows:

> "(4) **GAMBLING.** A person engages in gambling if he *stakes or risks something of value upon the outcome of a contest of chance or a future contingent event* not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome. . . .
>
> "(5) **GAMBLING DEVICE.** Any device, machine, paraphernalia or equipment that is normally used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine. However, lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes are not gambling devices within this definition."

§ 13A-12-20(4) and (5) (emphasis added). A slot machine is one form of a gambling device. Ala. Code (1975) § 13A-12-20(10).

The promotion of gambling and the possession of a gambling device both require that "something of value" be risked. "Something of value" is defined as:

> "(11) **SOMETHING OF VALUE.** Any money or property, any token, object or article exchangeable for

> money or property or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service entertainment or a privilege of playing at a game or scheme without charge."

Ala. Code § 13A-12-20(11).

The Alabama Legislature has specifically exempted "sweepstakes" from illegal gambling activities, including a lottery. A "sweepstakes" is defined as "[a] legal contest or game where anything of value is distributed by lot or chance." Ala. Code (1975) § 8-19D-1(4) (1989). Unlike a lottery, a "sweepstakes" does not include the payment of consideration for a chance to win a prize. *Pepsi Cola Bottling Co. v. Coca-Cola Bottling Co.,* 534 So. 2d 295, 296 (Ala. 1988).

"The three elements of a lottery are (1) a prize, (2) awarded by chance, and (3) for a consideration." *Pepsi,* 534 So. 2d at 296. See *Opinion of the Justices No. 277,* 397 So. 2d 546, 547 (Ala. 1981); *State ex rel. Tyson v. Ted's Game Enters.,* 893 So. 2d 376, 378 (Ala. 2004); *Grimes v. State,* 235 Ala. 192, 193, 178 So. 73 (Ala. 1937). All three elements must be present. "This three-pronged definition of 'lottery' was based on definitions of that term used by a vast number of authorities, both judicial and nonjudicial, and it is still accepted by the overwhelming majority of jurisdictions, as well as the United States Supreme Court." *Opinion of the Justices No. 373,* 795 So. 2d 630, 634-35 (Ala. 2001).

In *Pepsi,* supra, the Alabama Supreme Court held that Pepsi's bottle cap instant cash promotion did not constitute a prohibited lottery because the element of

consideration was absent. The court found that, although the elements of a prize and award by chance were present, "the 'Pepsi Instant Cash' game is not a lottery, because participants were not required to purchase cards in order to play." *Id.* at 297. Moreover, "[a]ny incidental profit or benefit to Pepsi in the sale of the soft drinks containing the 'under the crown' chance neither provides the consideration to make the game a lottery nor negates the free participation aspect of the game." *Id.*

Following the *Pepsi* decision, an Alabama Attorney General concluded that a promotional program which distributed a tear-off "scratch and win" game piece with the purchase of a prepaid phone card did not constitute a prohibited lottery because the element of consideration was lacking. *Op. Att'y Gen.* 99-28 (1998). In return for $1, the purchaser of a phone card received two minutes of prepaid long distance service. Each two-minute phone card contained a tear-off "scratch and win" game piece that gave the purchaser the opportunity to win a monetary prize ranging from $1 to $50,000. In addition to selling the phone card, the company made game pieces available for free to consumers at certain retailers, or by mailing a self-addressed, stamped envelope to the company. The Attorney General acknowledged that the proposed program satisfied the prize and award by chance elements of a lottery, but concluded that because the program "allows for the free distribution of game chances through a mail-in option," there is no element of consideration:

> "A plan that offers game pieces in conjunction with the purchase of a product, like the Phone Card plan proposed, must also provide for free distribution of game pieces or it will be deemed a

> lottery. . . . The Phone Card program proposed, which allows for the free distribution of game chances through a mail-in option, does not constitute a prohibited lottery." *Op. Att'y Gen.* 99-28 (1998).

Although lotteries are forbidden in Alabama, sweepstakes are not. Section 65 of the Alabama Constitution "does not prohibit the Legislature from authorizing gambling." *Opinion of the Justices No. 373,* 795 So. 2d 630, 641 (Ala. 2001). Even before the adoption of the Alabama Constitution of 1901, a distinction was made between lotteries and sweepstakes. See *Yellow-Stone Kit v. State,* 88 Ala. 196, 7 So. 338 (1889); *Buckalew v. State,* 62 Ala. 334, 335-36 (1878). The Alabama Legislature recognized the historical legality of sweepstakes in Section 8-19D-1(4) – where the payment of consideration for a chance to win a prize is lacking. See, e.g., *Pepsi,* 534 So. 2d 295; *Op. Att'y Gen.* 99-28 (1998); *Op. Att'y Gen.* 2005-173 (2005).

V.
PRINCIPLES OF INTERPRETATION

In determining the legality of the Quincy's Sweepstakes, this Court must follow well-settled principles of statutory construction. "Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect." *Ex parte Bertram,* 884 So. 2d 889, 891 (Ala. 2003) (internal quotes and citation to authority omitted).

Appendix D

This Court will not invade the province of the Alabama Legislature by declaring an activity illegal when the Legislature has not defined that activity as illegal. It is not within the domain of any Court to usurp the authority of the Legislature or to infringe upon the exercise of legislative power.

Ala. Const. 1901, Art. III, Section 43:

> "In the government of this state, except in the instances in this Constitution hereafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial power, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men." See *McInnish v. Riley,* 2005 WL 2403733 (Ala.).

Under the separation of powers section of our State Constitution, Ala. Const 1901, § 43, it is solely within the province of the Legislature to ascertain and determine when a particular act should be prohibited or declared criminal. *Beasley v. Bozeman,* 315 So. 2d 570 (Ala. 1975); *Tolbert v. Tolbert,* 903 So. 2d 103, 108 (Ala. 2004). Neither is it the function of this Court "to usurp the role of the legislature and correct defective legislation or amend statutes under the guise of construction." *Employees' Retirement System of Alabama v. Head,* 369 So.2d 1227, 1229 (Ala. 1979).

It is not the court's "place to engage in such a guessing game" of what the Legislature should have done or what the statute should have stated. *DeKalb County LP Gas Co. v. Suburban Gas, Inc.,* 729 So.2d 270, 277 (Ala. 1998).

Rather, the job of any court is "to say what the law is, not what it should be." *Hammonds v. Town of Priceville,* 886 So.2d 67, 70 (Ala. 2003).

VI.
FINDINGS OF FACT AND CONCLUSIONS OF LAW

The facts of the case are hardly in dispute. The task for the court is to determine the legal question of whether the Sweepstakes operation at the Race Course constitutes a lottery. The other legal question is whether the Sweepstakes operation constitutes gambling or use of a gambling device.

The CyberCenter services have substantial value and they enhance the racing experience at the Race Course. The plaintiffs expended significant funds for construction and operation of the CyberCenter thereby providing computer programs and access to pari-mutuel betting information and other personal and business services. The parties stipulated that "[t]he rates charged for access to the CyberCenter is fair market value."[3] Although usage of the CyberCenter was scant during the six days of operation, some purchasers of Internet time actually made use of the CyberCenter. During the six days of the Sweepstakes' operation, significant increases were experienced in attendance, pari-mutuel revenues, and concession sales at the Race Course facility. The promotion was apparently working. While some institutions, such as the Birmingham Public Libraries, provide free Internet access it cannot be

[3] Stipulation # 8.

disputed that Internet time is a valuable service for which many people have to pay. What the customers of the Quincy's Sweepstakes do with the Internet time they have purchased does not contradict the fact that they actually purchased a valuable service or product.

Neither the Sweepstakes system nor the other operations were designed to impose, and did not impose, a charge on customers for the entries they received in connection with their purchases of Internet time. The record contains no evidence that anything of value was required of the customers in order to receive Sweepstakes entries. Entries could be obtained by the customers either through purchases of Internet time or through a mail-in request for a free entry done according to rules established by the Birmingham Racing Commission. In the context of this case and considering all the evidence, this Court finds that any additional benefits to the customer over and above the Internet time, namely the Sweepstakes entries, were a gratuity as opposed to a purchase for consideration.

This Court concludes as a matter of fact and of law that the element of consideration is lacking in the Quinsy's Sweepstakes and therefore, the Quincy's Sweepstakes does not meet the definition of a lottery under current Alabama law.

With regard to gambling, the evidence was undisputed that the outcomes of the Sweepstakes entries are predetermined before they are given to the purchasers of Internet time. After the purchase, there is no contest of chance or future contingent event impacting whether the customer wins or loses. Consequently, neither the Sweepstakes nor the individual components thereof fit the

current definitions of illegal "gambling" or "gambling devices" contained in Sections 13A-12-20(4) and (5). Because no element of chance is present at the Readers, and because no consideration is paid or can be paid to use the Readers, this Court finds that the Readers are "dumb terminals" and are not slot machines or other types of gambling devices under Alabama law.

The Sheriff contends that the MegaSweeps operation is a "sham" while the plaintiffs vigorously deny this charge. A "sham" is defined in various dictionaries as: a spurious imitation; fake; something that is not what it purports to be; an imitation that is meant to deceive; a counterfeit; a deception. In some of these senses, the Sweepstakes operation is a sham. The court in this case, sitting without a jury, is the trier of the facts and it is clear that the Sweepstakes promotion is not what it appears to be; it appears to be a lottery, but it is not; it appears to be gambling, but it is not; the Readers appear to be slot machines, but they are not. So the court agrees with the Sheriff that in this sense the promotion is a sham. Despite the testimony at trial about the plaintiffs' high-sounding motivation in establishing the CyberCenter, the court finds that the plaintiff undertook this promotion to attract customers who wanted to gamble, or, at least, those who could be made to think that they were gambling. Plaintiffs' advertising through television commercials and billboards promoted playing MegaSweeps as an alternative to attending gambling establishments at Greentrack, or Philadelphia and Biloxi, Mississippi.[4]

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[4] Defendant's Exhibits 15 and 17.

Appendix D

The operation looks and sounds like a gambling casino, but under Alabama law it is not. The evidence convinces the court that through careful planning the plaintiffs have found a loophole in the patchwork of Alabama's anti-gambling laws and they have taken advantage of that loophole. In the words of the Sheriff's expert witness, Robert Sertell, the plaintiff's sweepstakes promotion was "trying to pull a tractor-trailer through a loophole."[5] This court agrees that the plaintiffs have taken advantage of weaknesses in the law, but it would be the height of judicial activism for this court to legislate in response to that loophole. Perhaps the Alabama Legislature will do so.

The stipulations of the parties, the evidence, and Alabama law compel this Court to rule that the Quincy's Sweepstakes promotion as explained and demonstrated to the Court is a lawful sweepstakes operation.

There has been no evidence of any wrongdoing on the part of the Sheriff Under the facts of this case, it is no surprise that different people seeking answers in good faith could come to different conclusions as to whether the plaintiffs' promotion was lawful. The matter is complex and it is only after a considerable amount of consideration of the evidence and of the law, that this court has concluded that it was lawful. When Sheriff Hale conducted the raid, he was relying on an undercover investigation and on expert opinion that the operation was illegal. The Sheriff was performing the duty imposed upon him by Alabama law:

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[5] Trial transcript 845-846.

> "(4) It shall be the duty of sheriffs in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals, and, insofar as within their power, to secure evidence of crimes in their counties and to present a report of the evidence so secured to the district attorney or assistant district attorney for the county." Ala. Code (1975) Section 36-22-3.

No court should discourage that vital function of law enforcement and nothing in this final judgment should be construed as criticism of the defendant's actions in connection with this case.

The plaintiffs have forcefully argued that the relevant statutes, Ala. Code (1975) Section 13A-12-20 *et seq.*, are unconstitutional as applied to this case because of vagueness. The United States Supreme Court has said that a law may be void for vagueness if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Smith v. Goguen,* 415 U.S. 566, 572, n.8 (1974). The argument may have merit, but because of the conclusion reached by the court that the plaintiffs' promotional scheme is lawful, the constitutional issue need not be addressed.

The Court finds that plaintiffs have established the requisites for permanent injunctive relief under Rule 65, Ala. R.Civ.P., as well as the requested declaratory judgment. The plaintiffs have succeeded in establishing the merits of the claims asserted in their complaint. Serious harm has occurred and threatens to continue if the shutdown is not permanently enjoined. An action at law for damages would not be an adequate remedy. The harm and continued threat of harm to the plaintiffs outweighs any

harm which an injunction will inflict on the Sheriff. In addition, a permanent injunction, permitting reopening and operation of the CyberCenter and the Quincy's Sweepstakes in the manner represented to this Court, will be consistent with Alabama's laws permitting legal sweepstakes.

FINAL JUDGMENT

Upon consideration it is ORDERED AND ADJUDGED as follows:

1. This Court declares that the Quincy' s Sweepstakes as represented to this Court during trial, is a lawful sweepstakes promotion and is not illegal under Alabama law.

2. The Sheriff is, therefore, permanently enjoined from further actions against such operations at the Race Course facility, provided plaintiffs operate the Sweepstakes as represented to the Court.

3. The Sheriff is instructed to return to the Race Course all money seized during the raid, as well as any remaining papers, records, equipment, or property siezed but not heretofore returned.

4. The plaintiffs deposited funds with the Sheriff to guarantee payment of the expenses incurred by the Sheriff to pay a moving company to return the plaintiffs' equipment to the Race Course. Said funds shall be used to pay (or reimburse, if they have been paid) such expenses and any balance remaining shall be returned by the Sheriff to the plaintiffs.

5. In view of this Court's Order, the Plaintiffs' Motion to Quash the Search Warrant and District Attorney's Subpoena are MOOT.

6. Costs are taxed as paid.

Done and ordered, this the 31st day of January, 2006.

/s/ **J. Scott Vowell**
J. SCOTT VOWELL,
PRESIDING JUDGE

cc: All counsel of record.

Appendix E

APPENDIX E – ORDER OF THE ALABAMA SUPREME COURT DENYING REHEARING FILED JANUARY 12, 2007

[LOGO] **IN THE SUPREME COURT OF ALABAMA**

January 12, 2007

1050625

David Barber, in his capacity as District Attorney for the Tenth Judicial Circuit of Alabama v. Jefferson County Racing Association, Inc., d/b/a the Birmingham race Course; and Innovative Sweepstakes Systems, Inc. (Appeal from Jefferson Circuit Court: CV-05-7684)

ORDER

The application for rehearing filed in this cause is overruled.

WOODALL, J. – See, Lyons, Harwood, Stuart, Smith, Bolin, and Parker, JJ., concur.

Appendix F

APPENDIX F – ORDER OF THE ALABAMA SUPREME COURT DENYING REHEARING FILED JANUARY 12, 2007

[LOGO] **IN THE SUPREME COURT OF ALABAMA**

January 12, 2007

1050857

David Barber, in his capacity as District Attorney for the Tenth Judicial Circuit of Alabama v. Jefferson County Racing Association, Inc., d/b/a the Birmingham Race Course, and Innovative Sweepstakes Systems, Inc. (Appeal from Jefferson Circuit Court: CV-05-7684)

ORDER

The application for rehearing filed in this cause is overruled.

WOODALL, J. See, Lyons, Harwood, Stuart, Smith, Bolin, and Parker, JJ., concur.

APPENDIX G – CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. XIV, § 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix H

APPENDIX H – JEFFERSON COUNTY RACING ASSOCIATION, INC.'S APPLICATION FOR REHEARING FILED IN THE ALABAMA SUPREME COURT ON DECEMBER 15, 2006

Nos. 1050625 and 1050857

IN THE SUPREME COURT OF ALABAMA

DAVID BARBER, in his capacity as District Attorney for the Tenth Judicial Circuit

Appellant,

v.

JEFFERSON COUNTY RACING ASSOCIATION, INC. d/b/a The Birmingham Race Course; INNOVATIVE SWEEPSTAKES SYSTEMS, INC.,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY CIVIL ACTION NO. CV-05-7684

APPLICATION FOR REHEARING OF APPELLEE, JEFFERSON COUNTY RACING ASSOCIATION, INC. D/B/A THE BIRMINGHAM RACE COURSE

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INTRODUCTION

In an opinion dated December 1, 2006 ("Opinion"), this Court reversed the trial court's judgment that that the sweepstakes promotion operated by the Jefferson County Racing Association, Inc. D/B/A the Birmingham Race Course ("JCRA") and designed by Innovative Sweepstakes Systems, Inc. ("Innovative") was a lawful sweepstakes promotion under Alabama law.

The Opinion included statements of nonrecusal issued by Justices Bolin, Smith, and Stuart who refused to recuse themselves despite the motions to disqualify them that were filed by JCRA and Innovative.[1] In addition, on

[1] A copy of JCRA's Motion to Disqualify Justices Michael Bolin and Patti Smith is attached hereto as Exhibit 1. A copy of JCRA's Motion to

(Continued on following page)

December 1, 2006, an Order denying the motions to disqualify Justices Bolin, Smith, and Stuart was issued by Justices See, Lyons, Harwood, Woodall, and Parker ("Non-recusal Order").

Chief Justice Nabers, on the other band, never issued a response to JCRA's motion to disqualify, nor did he recuse himself.[2] In addition, the Court never ruled on that motion as requested by JCRA. *See* Ex. 4, ¶ 7. Instead, Chief Justice Nabers' name is entirely absent from the Opinion, making it appear as if he was not involved in the deliberations concerning the case. JCRA, however, as noted below, is informed and believes that he was extensively involved in those deliberations – a factual issue that the members of the Court are not only in the best position to resolve, but one they also have an obligation to resolve.

GROUNDS

Pursuant to Rule 40 of the Alabama Rules of Appellate Procedure, JCRA requests that the Court grant its application for rehearing before *a newly appointed, neutral court* that is untainted by the involvement of the four Justices who should have recused themselves or been disqualified few hearing this appeal. JCRA's Application is based on the following grounds (which will be discussed more fully in JCRA's brief in support of this Application):

Disqualify Justice Jacquelyn "Lyn" Stuart is attached hereto as Exhibit 2.

[2] A copy of JCRA's Motion to Disqualify Chief Justice Nabers is attached hereto as Exhibit 3. A copy of JCRA's Amendment to Motion to Disqualify Chief Justice Drayton Nabers is attached hereto as Exhibit 4.

Appendix H

1. Based on the facts set forth below, as well as those set forth in JCRA's Motion to Disqualify Chief Justice Drayton Nabers and its Amendment to Motion to Disqualify Chief Justice Drayton Nabers, Chief Justice Nabers should have recused himself from any involvement in the case or he should have been disqualified by the remaining members of the Court.

2. Chief Justice Nabers' involvement in the decision of the appeal was not only a violation of his obligations under Canon 3.C. (1) of the Alabama Canons of Judicial Ethics, but it also resulted in the violation of JCRA's due process rights under the Alabama Constitution of 1901 and the 14th Amendment to the United States Constitution to have its case heard by a neutral and disinterested tribunal. *Marshall v. Jerrico, Inc.*, 446 US 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.").

3. Based on the facts set forth below, as well as those set forth in JCRA's Motion to Disqualify Justice Jacquelyn "Lyn" Stuart and its Motion to Disqualify Justices Michael Bolin and Patti Smith, Justices Bolin, Smith and Stuart should have recused themselves from any involvement in the case or they should have been disqualified by the other members of the Court.

4. The admitted involvement and participation of justices Bolin, Smith, and Stuart in the decision of the appeal, was not only a violation of their obligations under Canon 3.C(1) of the Alabama Canons of Judicial Ethics, but also resulted in the violation of JCRA's due process

rights to have its case heard by a neutral and disinterested tribunal.

5. The Due Process Clause of the United States Constitution sets the minimal requirements for judicial disqualification, and the states are "free to impose more rigorous standards for judicial disqualifications." *Aetna Life Insurance v. Lavoie,* 475 U.S. 813, 829 (1986) (vacating judgment of Alabama Supreme Court because of the involvement of one justice in the case in violation of Aetna's due process rights.) Although a precise test for when a justice's participation violates a party's due process rights cannot be made with precision, a reasonable formulation of the test is "whether the situation is one which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true." *Id.* at 822 (internal quotations omitted).

6. There is no indication in the Opinion or the Nonrecusal Order that this Court or any of the four justices applied this due process disqualification test. Under this test, disqualification is required in this appeal.

7. Under Alabama law, recusal is necessary under Canon 3.C(1) of the Alabama Canons of Judicial Ethics when "'facts are shown which make it reasonable for members of the public, or a party, or counsel opposed to question the impartiality of the judge.'" *In re Sheffield,* 465 so.2d 350, 355-56 (Ala. 1985) (quoting *Acromag-Viking v. Blalock,* 420 So. 2d 60, 61 (Ala. 1982).

> "The test that remains applicable at all tines, the answer to which always depends upon the 'totality of circumstances' of each case, is whether a

> person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find that there is a reasonable basis for questioning the judge's impartiality."

Ex parte City of Dothan Pers. Bd., 831 So. 2d 1, 11 (Ala. 2002) (citing *Sheffield*, 465 So. 2d at 356)).

8. There is no indication in the Opinion or the Nonrecusal Order that this Court, or any of the four Justices whose impartiality is here challenged, applied the Alabama test in determining whether the appearance of partiality required the disqualification of Chief Justice Nabers and Justices Bolin, Smith and Stuart. Had this test been conscientiously and properly applied, disqualification would have been the inescapable consequence.

9. Justice Bolin's interpretation of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), allows for unfettered free speech by a judge or justice without a concomitant responsibility for recusal under circumstances where the speech would cause a reasonable person to question the impartiality of the judge or justice. This interpretation violates the due process rights of JCRA and other litigants before this Court. This error was compounded by the concurrence of justices Smith and Stuart in Justice Bolin's misguided interpretation and by the Nonrecusal Order of the remaining Justices of this Court.

10. Had Chief Justice Nabers and Justices Bolin, Smith and Stuart been disqualified in accordance with constitutionally required due process of law, a special court would have had to have been appointed to hear this appeal.

11. In addition to the grounds set forth specifically herein, JCRA also adopts and incorporates herein by reference the grounds set forth in the Application for Rehearing filed by its Co-Appellee Innovative, including:

a. "The Court erred in basing its Opinion on the argument that MegaSweeps was comprised of slot machines – as defined in Alabama Code section 13A-12-20(10) – as that argument was waived at the trial court on two separate grounds;"

b. "The Sweepstakes promotion designed by Innovative and operated by JCRA is not comprised of slot machines . . . because the readers do not "eject" anything of value, and any argument that the controlling Alabama law on this issue should be overruled was waived;"

c. "This Court's interpretation of Alabama Code section 13A-12-20(10) constitutes a judicial broadening of a criminal statute;" and

d. "The components of the Sweepstakes are not gambling devices and the Sweepstakes is not a lottery, because any consideration paid by the customer was for Internet time, as stipulated by the parties."

STATEMENT OF FACTS

JCRA submits this statement of relevant facts in support of its Application for Rehearing.

The Political Ads of the Chief Justice Disparaged the Majority Owner of JCRA, a Litigant Before the Court

While this appeal was pending before this Court, Chief Justice Nabers was engaged in a hotly-contested

political campaign for election to the office of Chief Justice of the Alabama Supreme Court. That race was described as "a rough-and-tumble race that was called the nation's most expensive judicial campaign of the year." Jay Reeves, Associated Press, Nov. 07, 2006. The race "turned into a no-holds-barred match that has both candidates crying foul." Philip Rawls (AP) *Mudslinging or stating the facts? Expensive chief justice race becoming no holds barred for state's Nabers, Cobb, The Decatur Dailey,* Friday, October 27, 2006.

While the Alabama Supreme Court was considering this appeal, Chief Justice Nabers ran television campaign ads accusing his challenger, Alabama Court of Criminal Appeals Judge Sue Bell Cobb, of taking "gambling money" for campaign contributions. One of those ads specifically referenced contributions from Milton McGregor, who is widely known as the controlling owner of JCRA, in an accusatory and hostile manner implying that such contributions were somehow tainted or improper. As the Court is well aware, the core issue in this case was whether certain of Mr. McGregor's business activities constituted a lawful sweepstakes promotion or unlawful gambling.

Chief Justice Nabers' ads ran on television stations across the state and were the subject of much commentary by the media. It was reported that a Nabers' ad claimed that Judge Cobb had "accepted money from gambling interests – including Birmingham Race Track Owner Milton McGregor; the Poarch Creek Indians and PCI Gaming, which run[s] three Alabama casinos; and Greenetrack, which offers video gaming." Eric Valesco, *Gambling money, false ad claims fly, The Birmingham News,* October 25, 2006 (a copy of which is attached as Exhibit A to

JCRA's Supplement to Motion to Disqualify Chief Justice Drayton Nabers, which is attached hereto as Exhibit 5). In addition, in one of his later television ads, which also aired while this appeal was pending before this Court, Chief Justice Nabers proclaimed that he had fought against the "gambling bosses." The ad then referred to Mr. McGregor as a "casino boss." That ad can be viewed at Chief Justice Nabers' campaign website located at http://www.drayton nabers.com/media.asp (as accessed December 11, 2006) by clicking on the link entitled "Clear."

The Chief Justice Made Anti-Gambling Statements to Christian Action Alabama

Moreover, Chief Justice Nabers also used Christian Action Alabama ("CCA") to publicly state his opposition to the establishment of gambling. The Christian Action Alabama 2006 General Election Voter Guide reflected that Chief Justice Nabers "agrees" on the issue of "oppose establishment of gambling." *See* http://www.ccbama.org/ VoterGuides/VoterGuideMainWeb.pdf (as accessed December 13, 2006); *see also* Ex. 4, at Ex. A. CCA's opposition to gambling in any form is stated in detail on its website. http://www.ccbama.org/issues/gambling.asp (as accessed on December 11, 2006). Moreover, the Christian Coalition of Alabama took the position that the Sweepstakes promotion at issue in this appeal was illegal gambling. *See*

Appendix H

Letter of Christian Coalition president, John Giles to the Alabama Attorney General at C. 869-70.[3]

CAA's Involvement in this Case

As was noted in JCRA's motions to disqualify (Ex. 1, ¶ 3; Ex. 2, ¶ 3; Ex. 4, ¶ 2), CAA, which was formerly known as the Christian Coalition of Alabama, was also intimately involved in the facts surrounding this case. CCA had representatives present throughout the trial of this case. In fact, Sheriff Hale's expert witness, Robert Sertell admitted that he had been sitting with two representatives of the Christian Coalition, Dan Ireland and Eric Johnston, during the trial before he was called to the stand to offer his testimony on behalf of Sheriff Hale. R. 649-650. Mr. Sertell further admitted that he had conversations about JCRA (the Birmingham Race Course) with Christian Coalition president John Giles before his deposition in this case. R. 651. Mr. Sertell was described as a Christian Coalition "undercover expert" in Mr. Giles' letter to the Alabama Attorney General, dated December 22, 2005 – the day of the raid on JCRA's sweepstakes operation. R. 653-54; C. 733-735; 869.

[3] References to the record are as follows: "C." for Clerk's Record in Appeal No. 1050625; "R." for the Reporter's Transcript in Appeal No. 1050625

Appendix H

The Anti-gambling Statements of Justices Bolin, Smith and Stuart to CAA or its Predecessor the Christian Coalition of Alabama

Like Chief Justice Nabers, Justices Bolin, Smith and Stuart also used Christian Action Alabama, or its predecessor the Christian Coalition of Alabama, as a vehicle to publicly pronounce their opposition to gambling during their own contested elections. Justice Stuart in her contested election publicly indicated while this appeal was pending before this Court that she was opposed to the "establishment of gambling". *See* Christian Action 2006 Voter Guide http://www.ccbama.org/VoterGuides/VoterGuideMainWeb.pdf (as accessed December 13,2006), *see also* Ex. 2, at Ex. A. Justices Bolin and Smith, who were involved in contested elections in 2004, both publicly indicated through the 2004 Christian Coalition Voter Guide that they "oppose gambling." *See* http://www.ccbama.org/VoterGuides/2004VoterGuideV5.pdf (as accessed December 13, 2006), *see also* Ex. 1, at Ex. A. **JCRA's Nations to Disqualify**[4]

On October 24, 2006, the Clerk of the Alabama Supreme Court issued a written notice that the request for oral argument in this appeal had been denied and the matter had been submitted on briefs. Upon noticing that Justice Nabers had not recused or disqualified himself, JCRA immediately filed its Motion to Disqualify Chief Justice Drayton Nabers(dated October 26, 2006). The motion, which referenced Justice Nabers' campaign ads discussed above, argued that Justice Nabers should be

[4] Co-Appellee Innovative also filed a motion to disqualify Justices Bolin, Nabers, Smith and Stuart.

disqualified under the Alabama Canons of Judicial Ethics ("Ethical Canons") and on Due Process grounds. *See* Ex. 3. Shortly after JCRA filed this Motion, CCA released its 2006 General Election Voter Guide. Thereafter, on November 6, 2006, JCRA filed its Amendment to Motion to Disqualify Chief Justice Drayton Nabers. *See* Ex. 4. That same day JCRA filed its Motion to Disqualify Justice Jacquelyn "Lyn" Stuart and shortly thereafter its Motion to Disqualify Justices Michael Bolin and Patti Smith. Both motions argued that these Justices should be disqualified under the Ethical Canons and also on Due Process grounds. *See* Ex.'s 1 and 2.

The Rulings on the Motions to Disqualify Justices Bolin, Smith and Stuart and the Lack of a Ruling on the Motion to Disqualify Chief Justice Nabers

On December 1, 2006, this Court issued its Opinion, which included statements of nonrecusal filed by Justices Bolin, Smith and Stuart, all of whom participated in the appeal and concurred in the Court's Opinion reversing the trial court's ruling in favor of the Appellees. That same day, Justices See, Lyons, Woodall, and Parker, issued the Nonrecusal Order denying JCRA's and co-Appellee Innovative's motions to disqualify Justices Bolin, Smith and Stuart. Chief Justice Nabers never responded to the Appellees' motions to disqualify him, and did not recuse himself.[5] In addition, no ruling was ever issued by the

[5] In contrast, on October 30, 2006, just four days after JCRA's filed its motion to disqualify him, Chief Justice Nabers, in an unprecedented press release from the Alabama Supreme Court, announced that he was not participating in Exxon-Mobil's appeal of the largest verdict in Alabama history based on his prior personal involvement as state

(Continued on following page)

Court on JCRA's motion to disqualify Chief Justice Nabers, even though JCRA had specifically requested the remaining members of this Court to order Chief Justice Nabers' disqualification or recusal if he failed to recuse himself. Ex. 4, ¶ 7. Chief Justice Nabers' name does not appear anywhere on the Opinion.

Chief Justice Nabers' Undisclosed Participation in the Appeal

As this Court's inaction on JCRA's Motion to Disqualify Chief Justice Drayton Nabers suggests, JCRA is informed and believes that Chief Justice Nabers was actively involved in this Court's deliberations and that he participated in an opinion against JCRA that was scheduled to be released just before the November election, but which was than withheld from release. *See* Affidavit of Milton E. McGregor, ¶¶ 4-5 (a copy of which is attached hereto as Exhibit 6). Specifically, JCRA is informed and believes that:

1. An opinion of this Court reversing the trial court was scheduled to be released on Friday, October 27th 2006, less than two weeks prior to the election. (Ex. 6, ¶ 4).

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finance director in 2003-2004. The Exxon case had been (and still is) pending before the Alabama Supreme Court since April of 2004. No disqualification request had been filed in that case. "Nabers' campaign spokesman, Clay Ryan, said he assumed the Supreme Court issued the announcement because 'the honor of the court is being called into question in a series of campaign ads.'" Associated Press, October 30, 2006, *See* "Chief justice steps aside from Exxon Mobil appeal," http://www.al.com.newflash/regional/index.ssf?/base/news-25/1162234153195930.xml&storylist=alabamanews (as accessed November 6, 2006).

2. Chief Justice Nabers was present when the case was being discussed by the Court, participated in "all deliberations, meetings . . . leading up to the opinion and . . . voted on the case." (Ex. 6, ¶ 5).

3. "Chief Justice Nabers made his position regarding the case known to other members of the Court, brought to bear influence upon other members of the Court to adopt his position, and discussed the political ramifications of the decision with other members of the Court and with political consultants and operatives." (Ex. 6, ¶ 9). And,

4. The Chief Justice improperly discussed the case with Governor Riley, who advocated the reversal of the trial court's opinion. (Ex. 6, ¶ 6).[6]

Despite the facts believed by JCRA to be true, the Opinion actually issued by the Court on December 1, 2006, attempts to make it appear as if the Chief Justice had no involvement in the case.

Based upon the facts set forth above believed by the JCRA to be true, the requirements of the Alabama Canons of Judicial Ethics, and the Due Process protections of the United States Constitution, JCRA petitions this Court to have this appeal reheard by a neutral court to be specifically constituted and appointed for that purpose.

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[6] The Governor, who was also campaigning for re-election, filed an amicus brief in opposition to JCRA's position and issued a press release asking the Court to rule against JCRA. *See* Ex. 7.

Respectfully submitted this 15th day of December, 2006.

/s/ Peter J. Tepley
One of the Attorneys for
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by United States first class mail, properly addressed and postage prepaid, on this the 15th day of December, 2006.

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Appendix H

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Appendix H

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/s/ Peter J. Tepley
Of Counsel

EXHIBIT 1

IN THE SUPREME COURT OF ALABAMA

1050625

David Barber, as District Attorney of Jefferson County, Alabama v. Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course et al. (Appeal from Jefferson Circuit Court CV-05-7684).

1050857

David Barber, in his capacity as District Attorney for the Tenth Judicial Circuit of Alabama v. Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course; Mike Hale; and Innovative Sweepstakes Systems, In. (Appeal from Jefferson Circuit Court CV-05-7684).

Appendix H

MOTION TO DISQUALIFY JUSTICES MICHAEL BOLIN AND PATTI SMITH

COMES NOW Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course ("JCRA") and requests **Justice Michael Bolin** and **Justice Patti Smith** to disqualify and/or recuse[1] themselves from having any participation in any matter with regard to the above-styled cases for the following reasons:

1. Justices Bolin and. Smith ran contested political campaigns for election to the Alabama Supreme Court in 2004.

2. In 2004, both Justices publically indicated that they opposed the "establishment of gambling." The 2004 Christian Coalition Voter Guide reflects that both justices "oppose gambling." *See* Exhibit A, located at http://www.ccbama.org/VoterGuides/2004VoterGuideV5.pdf (as accessed November 7, 2006).

3. Justice Bolin's and Justice Smith's stated position on the establishment of gambling was made in response to a question posed by the then Christian Coalition of Alabama (now known as Christian Action Alabama). This same group had representatives present throughout the trial of this case and was specifically referenced in the testimony of Sheriff Hale's expert witness, Robert Sertell. In fact, Mr. Sertell admitted that he had been sitting with

---

[1] This Court has noted the distinction between "disqualification" and "recusal." *Ex parte City of Dothan Pers. Bd.*, 831 So. 2d 1, 6 (Ala. 2002). However, in these cases, that distinction is neither controlling nor of legal significance. Justice Stuart must remove herself from these cases regardless of terminology.

two representatives of the Christian Coalition, Dan Ireland and Eric Johnston, during the trial and before he was called to the stand to offer his testimony on behalf of Sheriff Hale. Mr. Sertell further admitted that he had conversations about the Birmingham Race Course with John Giles of the Christian Coalition. Mr. Sertell admitted that those conversations took place before his deposition in the case. Mr. Sertell further admitted that he had been referred to as an "undercover expert" by the Christian Coalition's Mr. Giles in a letter to Attorney General Troy King dated December 22, 2005 – the day of the raid on the Birmingham Race Course sweepstakes operation. In short, the Christian Coalition (Christian Action Alabama), has been intimately involved in this case.

4. The position of Christian Action Alabama is stated on its web site:

> "Gambling has been demonstrated to be destructive to individual lives, families, businesses and society as a whole. Gambling preys upon our youth, the elderly, minorities and those with less education. Millions of Americans are problem or pathological gamblers, producing huge financial and social costs. Whether a lottery, video gambling or any other form of gambling, Christian Action Alabama is unwilling to risk the life of one individual or the destruction of one family."

http://www.ccbama.org/issues/gambling.asp (as accessed November 6, 2006).

5. Christian Action Alabama is totally opposed to any form of gambling:

"– What's so bad about gambling?

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"There are thousands of broken families and shattered lives that can personally attest to the destructive effects of gambling. Besides these personal accounts, many scientific studies have reached the same conclusion: Gambling is destructive to individuals, families and society. In the late 90's the U.S. Congress commissioned a study to examine the social and economic impacts of gambling on states, tribes, communities and individuals. The results of this 2-year study were released by the National Gambling Impact Study Commission (view the report). In addition to this major study, a separate study was commissioned to examine "in the currently expanding gambling environment, the number or proportion of pathological gamblers in the United States is increasing and the possible effects of pathological gambling on individuals, families, and communities." The National Research Council research result estimated that in a given year, 1.8 million adult and at least 1.1 million adolescents are pathological gamblers (view the report).

* * *

"– Why do you oppose a state Lottery?

"Many books and scientific studies have demonstrated the inability for lotteries to deliver what they promise. In fact, most states with lotteries see very little increase (and often a decrease in growth) in revenue for selected budget items (education normally). As a form of gambling, lotteries are also destructive, preying on the poor (as a voluntary regressive tax).

* * *

"– How about casinos?

Appendix H

"Casinos are one of the most destructive entities a state can authorize. They are a breeding ground for pathological gamblers, with a full spectrum of gambling options. Besides the impact upon individuals and families, crime and corruption are strongly associated with casinos.

* * *

"– What is video gambling?

"Video gambling is a form of gambling that is particularly addictive. Known as the 'crack cocaine' of gambling, individuals literally sit for hours inserting money into box with lights and sounds, thinking that their 'skill' is important in winning. In truth, video gambling machines are controlled by software and are programmed to 'pay out' at a certain level.

* * *

"– Is Bingo really so bad?

"Bingo, as used by the gambling industry, is simply a sanitized word for 'video gambling'. Articles by the well-known gambling attorney, I. Nelson Rose makes this clear (Is It Bingo, Or a Slot Machine?, Caution – Bingo May Be Hazardous to Your Health, & Bingo – Without the B, I, N, G, or O). Video gambling is one of the most addictive forms of gambling available (known as the "crack cocaine of gambling").

http://www.ccbama.org/issues/gambling_getinformed.asp#videogambling (as accessed November 6, 2006).

6. Justices Bolin and Smith each took a political and ethical posture against gambling, each made his/her views

public and each made his/her anti-gambling position a basis of why each should be elected a Justice of the Alabama Supreme Court. This stance of both justices is indicative of a bias that could squarely impact the parties, interests, and issues in these appeals.

7. Milton McGregor is the controlling owner of the JCRA. Moreover, the core issue of the above-referenced cases concerns whether certain of McGregor's business activities constitute unlawful gambling or a lawful sweepstakes operation.

8. Under Canon 3(1) of Alabama's Canons for Judicial Ethics,

> "(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . . "

9. As this Court explained in *Ex parte Duncan,* 638 So. 2d 1332 (Ala. 1994):

> "Under Canon 3(C)(1), Alabama Canons of Judicial Ethics, recusal is required when 'facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge.' *Acromag-Viking v. Blalock,* 420 So.2d 60, 61 (Ala. 1982). Specifically, the Canon 3(C) test is: 'Would a person of ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a

> reasonable basis for questioning the judge's impartiality?' *Matter of Sheffield,* 465 So.2d 350, 356 (Ala. 1984). The question is not whether the judge was impartial in fact, but whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality – whether there is an appearance of impropriety. *Id.*; see *Ex parte Balogun,* 516 So.2d 606 (Ala. 1987); see, also, *Hall v. Small Business Administration,* 695 F.2d 175 (5th Cir.1983).

Duncan, 638 So. 2d at 1334 (emphasis added).

10. Therefore, it is clear that the Canons of Judicial Ethics mandate that a justice cannot sit on a case involving the issue of whether certain activities constitute unlawful gambling or a lawful sweepstakes operation when one of the justice's major political campaign platforms is against gambling.

11. Furthermore, the neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.

> "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. *See Carey v. Piphus,* 435 U.S. 247, 259-262, 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an

erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge,* 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' *Joint Anti-Fascist Committee v. McGrath,* 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

"The requirement of neutrality has been jealously guarded by this Court. . . . The Court stated that the Due Process Clause would not permit any 'procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.' 273 U.S., at 532. . . . We have employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure. Indeed, 'justice must satisfy the appearance of justice,' *Offutt v. United States,* 348 U.S. 11, 14 (1954), and this 'stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,' *In re Murchison,* 349 U.S. 133, 136 (1955). *See also, Taylor v. Hayes,* 418 U.S. 488 (1974)."

Marshall v. Jerrico, Inc., 446 US 238, 242, 100 S.Ct. 1610, 64 L. Ed. 2d 182 (1980).

12. The United States Supreme Court recognizes that the authority of the judicial system rests in the public's faith in the impartiality and nonpartisanship of its members:

> "Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe. *See Mistretta v. United States,* 488 U.S. 361, 407, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) ('The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.'). As the Minnesota Supreme Court has recognized, all legal systems – regardless of their method of judicial selection – 'can function only so long as the public, having confidence in the integrity of its judges, accepts and abides by judicial decisions.' *Complaint Concerning Winton,* 350 N.W.2d 337, 340 (1984).

Republican Party v. White, 536 U.S. 765, 817-818 (U.S. 2002).

13. A judge or justice must be a neutral decision maker and not an advocate. The issue presented by this motion is not about political speech. It is about a stated and demonstrated actual bias and prejudice to a both a participant and a legal issue in a case before this Court.

14. Recusal is necessary when "facts are shown which make it reasonable for members of the public, or a party, or counsel opposed to question the impartiality of the judge." *In re Sheffield,* 465 So. 2d 350, 355-56 (Ala. 1985) (quoting *Acromag-Viking v. Blalock,* 420 So. 2d 60, 61 (Ala. 1982)).

> "The test that remains applicable at all times, the answer to which always depends upon the

> 'totality of circumstances' of each case, is whether a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find that there is a reasonable basis for questioning the judge's impartiality."

Dothan Personnel Bd., 831 So. 2d at 11 (citing *Sheffield*, 465 So. 2d at 356)).

15. Petitioner has previously requested that Chief Justice Nabers and Justice Stuart recuse themselves in these same cases for their announced public anti-gambling positions.

16. THEREFORE, it is clear that the Canons of Judicial Ethics mandate that a justice cannot sit on a case involving the issue of whether certain activities constitute unlawful gambling or a lawful sweepstakes operation when one of his/her political campaign platforms is against gambling. Justice Bolin and Justice Smith must disqualify/recuse themselves from the above-styled cases.

17. In these cases, Chief Justice Nabers, Justice Lyn Stuart, Justice Bolin and Justice Smith should have all done exactly what Chief Justice Nabers did in the Exxon-Mobile case. They should have disqualified/recused themselves on their own motion.

18. If either Justice Bolin or Justice Smith refuses to disqualify/recuse himself/herself, the remaining five[2] Justices of the Alabama Supreme Court must act to disqualify/

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[2] Chief Justice Nabers and Justice Stuart are not qualified by ethical disposition to vote on the matter of the recusal/disqualification of Justices Bolin and Smith.

recuse both Justices[3]. The honor and credibility of this Court is at stake.

Respectfully submitted,

/s/ J. Mark White
One of the Attorneys for
Appellees, Jefferson County
Racing Association d/b/a
Birmingham Race Course

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[3] Recusal is a matter properly submitted first to the Justice whose recusal is sought, and only thereafter to the entire Court. *See Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060, 1089 (Ala. 1984), *vacated on other grounds*, 475 U.S. 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1996).

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Appendix H

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by First Class Mail properly addressed and postage prepaid, on this the 7th day of November, 2006.

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/s/ J. Mark White
OF COUNSEL

Appendix H

EXHIBIT A

Christian Coalition Of *Alabama* Inc.

[LOGO] 500 Adams Avenue
Suite 18
Montgomery, AL 36104
(334) 832-4688
Web – http://www.ccbama.org
Email – cca@ccbama.org

Our Vision

The Christian Coalition's vision is informed citizens electing leaders who leave a great legacy.

Our Mission

We believe that people of faith have a right and a responsibility to be involved in the world around them. That involvement includes social, community and political action.

Our Areas of Involvement

- Defending the institution of marriage
- Strengthening the family
- Returning education to local and parental control
- Punishing criminals and defending victims' rights
- Protecting innocent human life
- Protecting religious freedom
- Easing the tax burden on families
- Protecting young people and our communities from the pollution of pornography
- Protecting our communities from the expansion of gambling

★ Vote on November 2nd ★

www.ccbama.org

2004 Christian Coalition VOTER GUIDE

PRESIDENTIAL Election

George Bush (R)	ISSUES	John Kerry (D)
Support	Passage of a Federal Marriage Protection Amendment	Oppose
Support	Permanent Extension of the $1,000 Per Child Tax Credit	Oppose
Support	Educational Choice for Parents (Vouchers)	Oppose
Oppose	Unrestricted Abortion on Demand	No Response
Support	Federal Funding for Faith-Based Charitable Organizations	No Response
Support	Permanent Elimination of the Marriage Penalty Tax	Oppose
Support	Permanent Elimination of the Death Tax	Oppose
Support	Banning Partial Birth Abortions	Oppose
Oppose	Public Financing of Abortions	Support
Oppose	Federal Firearms Registration & Licensing of Gun Owners	No Response
Oppose	Adoption of Children by Homosexuals	No Response
Support	Prescription Drug Benefits for Medicare Recipients	Support
Oppose	Placing U.S. Troops Under U.N. Control	No Response
Oppose	Affirmative Action Programs that Provide Preferential Treatment	Support
Support	Allowing Younger Workers to Invest a Portion of their Social Security Tax in a Private Account	Oppose

www.georgewbush.com www.johnkerry.com

Each candidate was sent a 3406 issue Survey by mail and/or facsimile (Fax) machine. When possible, positions of candidates on issues were verified or determined using voting records and/or public statements.

Distributed by the Christian Coalition of America, P.O. Box 37030 - Washington, DC 20013

The Christian Coalition of America is a pro-family citizen action organization. This voter guide is provided for educational purposes only and is not to be construed as an endorsement of any candidate or political party.

Please visit our website at www.cc.org, and the Alabama website at www.ccbama.org

★ Vote on November 2nd ★

U.S. Senate

Richard Shelby (R)	ISSUES	Wayne Sowell (D)
Support	Prohibit Abortion	Support
Support	Prohibit Embryonic Stem Cell Research	Undecided
Support	Education Choice For Parents	Undecided
Oppose	Increase Federal Income Taxes	Oppose
Support	Federal Marriage Amendment (Defining Marriage Between a Man & Woman)	Undecided
Oppose	Legalization of Marijuana	Support
Support	Congress Should Use Impeachment to Reign in Judicial Activists	Undecided
Support	Display of Ten Commandments on Public Property	Undecided
Oppose	Placing U.S. Troops Under UN Control	Oppose

U.S. House of Representatives

DISTRICT 5

Gerald Wallace (R)	ISSUES	Bud Cramer (D)
Support	Partial Birth Abortion Ban	Support [1]
Oppose	Abortions in Military Medical Facilities	Support [2]
Support	Human Cloning Ban	Support [3]
Support	Congressional Super-Majority to Raise Taxes	Support [4]
Support	Federal Marriage Amendment (Defining Marriage Between a Man & Woman)	Support [5]
Undecided	Tax Credits for Private Health Insurance	Oppose [6]
Support	Education Choice for Parents	Oppose [7]
Support	Display of Ten Commandments on Public Property	Support [8]
Oppose	Increase Federal Income Taxes	Oppose [9]

(1) Voted For S. 3 (Roll Call 330) (2-15-03) (2) - Voted For H.R. 588 (Roll Call 113) (3-5-03) (3) - Voted Against Amendment to HR 1365 (Roll Call 202) (10-31-01) (4) - Voted For (5) Voted for H.J.RES 116 (Roll Call 480) (11-25-03) (6) - Voted Against HR 1996 (Roll Call 250) (6-16-03) (7) - Voted Against HR 2563 (Roll Call 439) (9-09-03) (8) - Co-Sponsor of Ten Commandments Defense Act of 2003 (9) - Voted For HR 2 (5-19-99)

Alabama Supreme Court

PLACE 1

Tom Parker (R)	ISSUES	Robert Smith (D)
Decline	Unborn Child is a Fellow Human Being	No Response
Decline	Oppose Gambling	No Response
Decline	Support Same Sex Marriage	No Response
Decline	State Can Acknowledge God	No Response
Decline	Judicial Activism is Never Appropriate	No Response
Decline	Judicial Branch Can Impose Taxes	No Response

Alabama Supreme Court

PLACE 2

Paul Smith (R)	ISSUES	Roger Monroe (D)
Agree	Unborn Child is a Fellow Human Being	No Response
Agree	Oppose Gambling	No Response
Disagree	Support Same Sex Marriage	No Response
Agree	State Can Acknowledge God	No Response
Agree	Judicial Activism is Never Appropriate	No Response
Disagree	Judicial Branch Can Impose Taxes	No Response

Alabama Supreme Court

PLACE 3

Michael Bolin (R)	ISSUES	John Rochester (D)
Agree	Unborn Child is a Fellow Human Being	No Response
Agree	Oppose Gambling	No Response
Disagree	Support Same Sex Marriage	No Response
Agree	State Can Acknowledge God	No Response
Agree	Judicial Activism is Never Appropriate	No Response
Disagree	Judicial Branch Can Impose Taxes	No Response

Alabama Court of Civil Appeals

Tommy Bryan (R)	ISSUES	Sharon Yates (D)
Agree	Unborn Child is a Fellow Human Being	No Response
Agree	Oppose Gambling	No Response
Disagree	Support Same Sex Marriage	No Response
Agree	State Can Acknowledge God	No Response
Agree	Judicial Activism is Never Appropriate	No Response
Disagree	Judicial Branch Can Impose Taxes	No Response

Alabama Board of Education

DISTRICT 7

Perry Prescott (R)	ISSUES	Sandra Ray (D)
Support	Education Choice For Parents	No Response
Oppose	Public Schools Teaching Homosexuality as Acceptable Lifestyle	No Response
Oppose	Increase Property Taxes	No Response
Support	Prohibit Abortion	No Response
Oppose	Establishment of a State Lottery	No Response

Vote on November 2nd

BEST AVAILABLE COPY

Appendix H

EXHIBIT 2

IN THE SUPREME COURT OF ALABAMA

1050625

David Barber, as District Attorney of Jefferson County, Alabama v. Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course et al. (Appeal from Jefferson Circuit Court CV-05-7684).

1050857

David Barber, in his capacity as District Attorney for the Tenth Judicial Circuit of Alabama v. Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course; Mike Hale; and Innovative Sweepstakes Systems, In. (Appeal from Jefferson Circuit Court CV-05-7684).

MOTION TO DISQUALIFY
JUSTICE JACQUELYN "LYN" STUART

COMES NOW Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course ("JCRA") and requests Justice Jacquelyn "Lyn" Stuart to disqualify and/or recuse[1] herself from having any participation in any matter with regard to the above-styled cases for the following reasons:

---

[1] This Court has noted the distinction between "disqualification" and "recusal." *Ex parte City of Dothan Pers. Bd.*, 831 So. 2d 1, 6 (Ala. 2002). However, in these cases, that distinction is neither controlling nor of legal significance. Justice Stuart must remove herself from these cases regardless of terminology.

Appendix H

1. Justice Stuart is currently engaged in a political campaign for re-election to the office of Justice of the Alabama Supreme Court.

2. Justice Stuart has publically indicated that she opposes the "establishment of gambling." The recently released Christian Action Alabama 2006 General Election Voter Guide reflects that Justice Stuart "agrees" on the issue of "oppose establishment of gambling." *See* Exhibit A, located at http://www.ccbama.org/VoterGuides/VoterGuide MainWeb.pdf (as accessed November 6, 2006).

3. Justice Stuart's stated position on the establishment of gambling was made in response to a question posed by Christian Action Alabama, formerly known as the Christian Coalition of Alabama. This same group had representatives present throughout the trial of this case and was specifically referenced in the testimony of Sheriff Hale's expert witness, Robert Sertell. In fact, Mr. Sertell admitted that he had been sitting with two representatives of the Christian Coalition, Dan Ireland and Eric Johnston, during the trial and before he was called to the stand to offer his testimony on behalf of Sheriff Hale. Mr. Sertell further admitted that he had conversations about the Birmingham Race Course with John Giles of the Christian Coalition. Mr. Sertell admitted that those conversations took place before his deposition in the case. Mr. Sertell further admitted that he had been referred to as an "undercover expert" by the Christian Coalition's Mr. Giles in a letter to Attorney General Troy King dated December 22, 2005 – the day of the raid on the Birmingham Race Course sweepstakes operation. In short, the Christian Coalition, (now Christian Action Alabama) has been intimately involved in this case.

4. The position of Christian Action Alabama is stated on its web site:

> "Gambling has been demonstrated to be destructive to individual lives, families, businesses and society as a whole. Gambling preys upon our youth, the elderly, minorities and those with less education. Millions of Americans are problem or pathological gamblers, producing huge financial and social costs. Whether a lottery, video gambling or any other form of gambling, Christian Action Alabama is unwilling to risk the life of one individual or the destruction of one family."

http://www.ccbama.org/issues/gambling.asp (as accessed November 6, 2006).

5. Christian Action Alabama is totally opposed to any form of gambling:

> "– What's so bad about gambling?
>
> "There are thousands of broken families and shattered lives that can personally attest to the destructive effects of gambling. Besides these personal accounts, many scientific studies have reached the same conclusion: Gambling is destructive to individuals, families and society. In the late 90's the U.S. Congress commissioned a study to examine the social and economic impacts of gambling on states, tribes, communities and individuals. The results of this 2-year study were released by the National Gambling Impact Study Commission (view the report). In addition to this major study, a separate study was commissioned to examine "in the currently expanding gambling environment, the number or proportion of pathological gamblers in the United

States is increasing and the possible effects of pathological gambling on individuals, families, and communities." The National Research Council research result estimated that in a given year, 1.8 million adult and at least 1.1 million adolescents are pathological gamblers (view the report).

* * *

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"Many books and scientific studies have demonstrated the inability for lotteries to deliver what they promise. In fact, most states with lotteries see very little increase (and often a decrease in growth) in revenue for selected budget items (education normally). As a form of gambling, lotteries are also destructive, preying on the poor (as a voluntary regressive tax).

* * *

"– How about casinos?

"Casinos are one of the most destructive entities a state can authorize. They are a breeding ground for pathological gamblers, with a full spectrum of gambling options. Besides the impact upon individuals and families, crime and corruption are strongly associated with casinos.

* * *

"– What is video gambling?

"Video gambling is a form of gambling that is particularly addictive. Known as the 'crack cocaine' of gambling, individuals literally sit for hours inserting money into box with lights and sounds, thinking that their 'skill' is important in

> winning. In truth, video gambling machines are controlled by software and are programmed to 'pay out' at a certain level.
>
> * * *
>
> "– Is Bingo really so bad?
>
> "Bingo, as used by the gambling industry, is simply a sanitized word for 'video gambling'. Articles by the well-known gambling attorney, I. Nelson Rose makes this clear (Is It Bingo, Or a Slot Machine?, Caution – Bingo May Be Hazardous to Your Health, & Bingo – Without the B, I, N, G, or O). Video gambling is one of the most addictive forms of gambling available (known as the "crack cocaine of gambling").

http://www.ccbama.org/issues/gambling_getinformed.asp#videogambling (as accessed November 6, 2006).

6. Justice Stuart has taken a political and ethical posture against gambling, has made her views public and has made her anti-gambling position a basis of why she should be re-elected a Justice of the Alabama Supreme Court. This stance is indicative of a bias that could squarely impact the parties, interests, and issues in these appeals.

7. Milton McGregor is the controlling owner of the JCRA. Moreover, the core issue of the above-referenced cases concerns whether certain of McGregor's business activities constitute unlawful gambling or a lawful sweepstakes operation.

8. Under Canon 3(1) of Alabama's Canons for Judicial Ethics,

> "(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . ."

9. As this Court explained in *Ex parte Duncan,* 638 So. 2d 1332 (Ala. 1994):

> "Under Canon 3(C)(1), Alabama Canons of Judicial Ethics, recusal is required when 'facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge.' *Acromag-Viking v. Blalock,* 420 So.2d 60, 61 (Ala.1982). Specifically, the Canon 3(C) test is: 'Would a person of ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?' *Matter of Sheffield,* 465 So.2d 350, 356 (Ala.1984). The question is not whether the judge was impartial in fact, but whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality – whether there is an appearance of impropriety. *Id.*; see *Ex parte Baloqun,* 516 So.2d 606 (Ala.1987); see, also, *Hall v. Small Business Administration,* 695 F.2d 175 (5th Cir.1983).

Duncan, 638 So. 2d at 1334 (emphasis added).

10. Therefore, it is clear that the Canons of Judicial Ethics mandate that a justice cannot sit on a case involving the issue of whether certain activities constitute unlawful gambling or a lawful sweepstakes operation when one of the justice's major political campaign platforms is against gambling.

11. Furthermore, the neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.

> "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. *See Carey v. Piphus,* 435 U.S. 247, 259-262, 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge,* 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' *Joint Anti-Fascist Committee v. McGrath,* 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

> "The requirement of neutrality has been jealously guarded by this Court. . . . The Court stated that the Due Process Clause would not permit any 'procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.' 273 U.S., at 532. . . . We have employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure. Indeed, 'justice must satisfy the appearance of justice,' *Offutt v. United States,* 348 U.S. 11, 14 (1954), and this 'stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,' *In re Murchison,* 349 U.S. 133, 136 (1955). *See also Taylor v. Hayes,* 418 U.S. 488 (1974)."

Marshall v. Jerrico, Inc., 446 US 238, 242, 100 S.Ct. 1610, 64 L. Ed. 2d 182 (1980).

12. The United States Supreme Court recognizes that the authority of the judicial system rests in the public's faith in the impartiality and nonpartisanship of its members:

> "Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe. *See Mistretta v. United States,* 488 U.S. 361, 407, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) ('The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.'). As

> the Minnesota Supreme Court has recognized, all legal systems – regardless of their method of judicial selection – 'can function only so long as the public, having confidence in the integrity of its judges, accepts and abides by judicial decisions.' *Complaint Concerning Winton,* 350 N.W.2d 337, 340 (1984).

Republican Party v. White, 536 U.S. 765, 817-818 (U.S. 2002).

13. A judge or justice must be a neutral decision maker and not an advocate. The issue presented by this motion is not about political speech. It is about a stated and demonstrated actual bias and prejudice to a participant and an issue in a legal case before this Court.

14. Recusal is necessary when "facts are shown which make it reasonable for members of the public, or a party, or counsel opposed to question the impartiality of the judge." *In re Sheffield,* 465 So. 2d 350, 355-56 (Ala, 1985) (quoting *Acromag-Viking v. Blalock,* 420 So. 2d 60, 61 (Ala. 1982)).

> "The test that remains applicable at all times, the answer to which always depends upon the 'totality of circumstances' of each case, is whether a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find that there is a reasonable basis for questioning the judge's impartiality."

Dothan Personnel Bd., 831 So. 2d at 11 (citing *Sheffield,* 465 So. 2d at 356)).

15. Petitioner has previously requested that Chief Justice Nabers recuse himself in these same cases for his announced public anti-gambling positions.

16. THEREFORE, it is clear that the Canons of Judicial Ethics mandate that a justice cannot sit on a case involving the issue of whether certain activities constitute unlawful gambling or a lawful sweepstakes operation when one of her political campaign platforms is against gambling. Justice Stuart must disqualify/recuse herself from the above-styled cases.

17. If Justice Stuart refuses to disqualify/recuse himself, the remaining seven[2] Justices of the Alabama Supreme Court must act to disqualify/recuse Justice Stuart[3]. The honor and credibility of this Court is at stake.

Respectfully submitted,

/s/ J. Mark White
One of the Attorneys for
Appellees, Jefferson County
Racing Association d/b/a
Birmingham Race Course

---

[2] Chief Justice Nabers is not qualified by ethical disposition to vote on the matter of Justice Stuart's recusal/disqualification.

[3] Recusal is a matter properly submitted first to the Justice whose recusal is sought, and only thereafter to the entire Court. *See Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060, 1089 (Ala. 1984), *vacated on other grounds*, 475 U.S. 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1996).

Appendix H

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by First Class Mail, properly addressed and postage prepaid, on this the 6th day of November, 2006.

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/s/ J. Mark White
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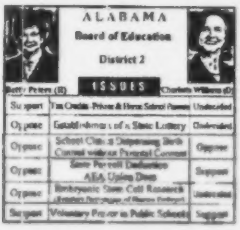
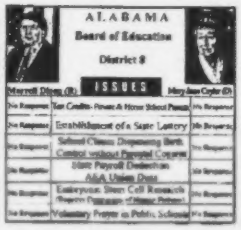


ALABAMA
Board of Education
District 2
ISSUES

Betty Peters (R)		Charlotte Williams (D)
Support	Tax Credits- Private & Home School Parents	Undecided
Oppose	Establishment of a State Lottery	Undecided
Oppose	School Choice & Dispensing Birth Control without Parental Consent	Oppose
Oppose	State Payroll Deduction AEA Union Dues	Support
Oppose	Embryonic Stem Cell Research (Requires Destruction of Human Embryos)	Undecided
Support	Voluntary Prayer in Public Schools	Support



ALABAMA
Board of Education
District 8
ISSUES

Merrell Dixon (R)		Mary Jane Caylor (D)
No Response	Tax Credits- Private & Home School Parents	No Response
No Response	Establishment of a State Lottery	No Response
No Response	School Choice: Dispensing Birth Control without Parental Consent	No Response
No Response	State Payroll Deduction AEA Union Dues	No Response
No Response	Embryonic Stem Cell Research (Requires Destruction of Human Embryos)	No Response
No Response	Voluntary Prayer in Public Schools	No Response

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ALABAMA
Governor

Bob Riley (R)	ISSUES	Lucy Baxley (D)
Support	Prohibit Abortion	No Response
Oppose	Embryonic Stem Cell Research (Requires Destruction of Human Embryos)	No Response
Oppose	Establishment of a State Lottery	No Response
Oppose	State Sponsored Gambling to Fund Education	No Response
Support	Tax Credits- Private & Home School Parents	No Response
Support	Reduce Expenses to Solve Provision Problems	No Response
Support	Constitutional Amendment Banning Electronic Gambling (Including Bingo & Sweepstakes)	No Response
Oppose	Constitutional Convention	No Response

ALABAMA
Chief Justice

Drayton Nabers (R)	ISSUES	Sue Bell Cobb (D)
Agree	Unborn Child is Fellow Human Being	No Response
Agree	Home School Education Tax Credits	No Response
Agree	Oppose Establishment of Gambling	No Response
Agree	Voter Identification	No Response
Agree	The State Can Acknowledge God	No Response
Agree	Alabama "Lawsuit Abuse" Harms Economic Development	No Response
Disagree	Judicial Branch May Impose Taxes	No Response
Disagree	Same Sex Marriage	No Response

EXECUTIVE BRANCH

Lieutenant Governor

Luther Strange (R)	ISSUES	Jim Folsom, Jr. (D)
Support	Prohibit Abortion	No Response
Oppose	Casino Gambling	No Response
Support	Require Voter Approval Tax Increases	No Response
Support	Tax Credits- Private & Home School Parents	No Response

State Auditor

Sam Shaw (R)	ISSUES	Jim Zeigler (D)
Support	Prohibit Abortion	No Response
Oppose	Casino Gambling	No Response
Support	Require Voter Approval Tax Increase	No Response
Support	Tax Credits- Private & Home School Parents	No Response

Attorney General

Troy King (R)	ISSUES	John Tyson, Jr. (D)
Support	Prohibit Abortion	No Response
Oppose	Casino Gambling	No Response
Support	Require Voter Approval Tax Increase	No Response
Support	Tax Credits- Private & Home School Parents	No Response

Commissioner Agriculture & Industries

Albert Lipscomb (R)	ISSUES	Ron Sparks (D)
Support	Prohibit Abortion	No Response
Oppose	Casino Gambling	No Response
Support	Require Voter Approval Tax Increase	No Response
Support	Tax Credits- Private & Home School Parents	No Response

Secretary of State

Beth Chapman (R)	ISSUES	Nancy Worley (D)
Support	Prohibit Abortion	No Response
Oppose	Casino Gambling	No Response
Support	Require Voter Approval Tax Increase	No Response
Support	Tax Credits- Private & Home School Parents	No Response

Public Service Commission Place 1

John Hire (R)	ISSUES	Jim Cook (D)
Support	Prohibit Abortion	No Response
Oppose	Casino Gambling	No Response
Support	Require Voter Approval Tax Increase	No Response
Support	Tax Credits- Private & Home School Parents	No Response

State Treasurer

Kay Ivey (R)	ISSUES	Steve Segrest (D)
Support	Prohibit Abortion	No Response
Oppose	Casino Gambling	No Response
Support	Require Voter Approval Tax Increase	No Response
Oppose	Tax Credits- Private & Home School Parents	No Response

Public Service Commission Place 2

Terry Meagher, Jr. (R)	ISSUES	Susan Parker (D)
Support	Prohibit Abortion	No Response
Oppose	Casino Gambling	No Response
Support	Require Voter Approval Tax Increase	No Response
Support	Tax Credits- Private & Home School Parents	No Response

JUDICIAL BRANCH

Supreme Court Place 2

Tom Woodall (R)	ISSUES	Gordon Stuart (D)
No Response	Unborn Child is a Fellow Human Being	No Response
No Response	State Can Acknowledge God	No Response
No Response	Oppose Establishment of Gambling	No Response
No Response	Alabama "Lawsuit Abuse" Harms Economic Development	No Response

Supreme Court Place 3

Lyn Stuart (R)	ISSUES	Albert Johnson (D)
Agree	Unborn Child is a Fellow Human Being	Agree
Agree	Roe v. Wade - Judicial Activism	Disagree*
Agree	Oppose Establishment of Gambling	Undec*
Agree	Alabama "Lawsuit Abuse" Harms Economic Development	Disagree

Supreme Court Place 4

Glenn Murdock (R)	ISSUES	John England, Jr. (D)
Agree	Unborn Child is a Fellow Human Being	No Response
Agree	State Can Acknowledge God	No Response
Agree	Oppose Establishment of Gambling	No Response
Agree	Alabama "Lawsuit Abuse" Harms Economic Development	No Response

Court of Civil Appeals Place 1

Terry Moore (R)	ISSUES	Ben Vreeland (D)
Agree	Unborn Child is a Fellow Human Being	Agree
Disagree	Homosexual Adoption	Undecided
Agree	American Flag Burning Constitutional Amendment	Disagree
Agree	Alabama "Lawsuit Abuse" Harms Economic Development	Disagree

Court of Civil Appeals Place 2

Craig Pittman (R)	ISSUES	Kimberly Hinkle (D)
Agree	Unborn Child is a Fellow Human Being	No Response
Agree	State Can Acknowledge God	No Response
Agree	Oppose Establishment of Gambling	No Response
Agree	Alabama "Lawsuit Abuse" Harms Economic Development	No Response

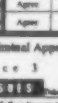
Court of Civil Appeals Place 3

Jim Moore (R)	ISSUES	Jim Moore (D)
Agree	Unborn Child is a Fellow Human Being	Agree
Agree	Roe v. Wade - Judicial Activism	Undecided
Agree	Tax Commissioner Moral Foundations of Law	No Response
Agree	Strategy Led Days	Undecided

Court of Criminal Appeals Place 1

Craig Shaw (R)	ISSUES	Andrew Ford, Jr. (D)
Agree	Unborn Child is a Fellow Human Being	No Response
Agree	State Can Acknowledge God	No Response
Agree	Oppose Establishment of Gambling	No Response
Agree	Alabama "Lawsuit Abuse" Harms Economic Development	No Response

Court of Criminal Appeals Place 2



Keith Wier (R)	ISSUES	Claude Fallon (D)
Agree	Unborn Child is a Fellow Human Being	No Response
Agree	State Can Acknowledge God	No Response
Agree	Oppose Establishment of Gambling	No Response
Agree	Alabama "Lawsuit Abuse" Harms Economic Development	No Response

Court of Criminal Appeals Place 3

Sam Welch (R)	ISSUES	Deborah Bell Powell (D)
Agree	Unborn Child is a Fellow Human Being	No Response
Agree	State Can Acknowledge God	No Response
Disagree*	Oppose Establishment of Gambling	No Response
Agree	Alabama "Lawsuit Abuse" Harms Economic Development	No Response

* Review: This response indicates that I would otherwise affirmatively answer the question, we believe that I am prohibited from doing so by Alabama Canon of Judicial Ethics 7B(1)(b), which provides in relevant part, that judicial candidates "shall not make any promises of conduct in office other than the faithful performance of the duties of office" and "shall not announce or advance the candidate's conclusions of law on any pending litigation, and would be disqualified under Canon 3C for lack of impartiality."

Candidates' responses are based on the Alliance Share Issues Survey sent by certified mail or facsimile machine. When possible, positions of candidates on issues were verified or documented using voting records and/or public statements. This voter guide meets all IRS and FEC guidelines and is appropriate for distribution to churches, synagogues and other 501(c)(3) organizations. Paid for and authorized by Christian Action Alabama, 509 Adams Ave, Suite 18, Montgomery, Alabama 36104. Christian Action Alabama is a pro family citizen action organization. This voter guide is provided for educational purposes only and in no way be construed as an endorsement of any candidate or political party.

Appendix H

EXHIBIT 3

IN THE SUPREME COURT OF ALABAMA

1050625

David Barber, as District Attorney of Jefferson County, Alabama v. Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course et al. (Appeal from Jefferson Circuit Court CV-05-7684).

1050857

David Barber, in his capacity as District Attorney for the Tenth Judicial Circuit of Alabama v. Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course; Mike Hale; and Innovative Sweepstakes Systems, Inc. (Appeal from Jefferson Circuit Court CV-05-7684).

MOTION TO DISQUALIFY
CHIEF JUSTICE DRAYTON NABERS

COMES NOW Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course ("JCRA") and requests Chief Justice Drayton Nabers to disqualify and/or recuse[1] himself from having any participation in any matter with regard to this appeal for the following reasons:

1. As set forth more particularly below, JCRA respectfully requests that Chief Justice Drayton Nabers

[1] As noted by this Court, the distinction between "disqualification" and "recusal" is fundamentally procedural. *Ex parte City of Dothan Pers. Bd.*, 831 So. 2d 1, 6 (Ala. 2002). However, in this case, that distinction is neither controlling nor of legal significance. Justice Nabers should remove himself from this case regardless of terminology.

disqualify and recuse himself from participation in this appeal due to his lack of impartiality concerning matters related to gambling and gambling interests. While JCRA maintains that its activities are entirely lawful, this case arises from accusations that certain of JCRA's business activities constitute unlawful gambling. As evidenced in recent political campaign advertisements, JCRA reasonably questions Chief Justice Nabers' impartiality on this issue.

2. Recusal is a matter properly submitted first to the Justice whose recusal is sought, and only thereafter to the entire Court. *See Aetna Life Ins. Co. v. Lavoie,* 470 So. 2d 1060, 1089 (Ala. 1984), *vacated on other grounds,* 475 U.S. 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1996).

3. Following his gubernatorial appointment to public office of Chief Justice of the Alabama Supreme Court, Drayton Nabers is currently engaged in a political campaign for election to the office of Chief Justice of the Alabama Supreme Court.

4. In recent television campaign ads, Chief Justice Nabers accuses his challenger, Judge Sue Bell Cobb, of taking "gambling money" for campaign contributions. Specifically, Chief Justice Nabers' latest ad references contributions from Milton McGregor (among others) in an accusatory and hostile manner implying that such contributions are somehow "tainted." The media reports that "Nabers' latest ad says Cobb accepted money from gambling interests – Birmingham Race Course owner Milton McGregor; the Poarch Creek Indians and PCI Gaming, which run three Alabama casinos; and Greenetrack, which offers video gaming." Eric Valesco, *Gambling money, false*

ad claims fly, The Birmingham News, October 25, 2006. [Exhibit A]

5. In addition, in his latest television ad, Chief Justice Nabers proclaims that he has "fought against the gambling bosses." That ad can be viewed at Nabers' campaign website located at *http://www.draytonnabers.com/media.asp* (as accessed October 25, 2006) by clicking on the link entitled "Clear."

6. A central plank in Chief Justice Nabers' political campaign is his opposition to gambling and gambling interests. This stance is indicative of a bias that could squarely impact the parties and interests in this appeal.

7. Milton McGregor is the controlling owner of the JCRA. Moreover, the core issue of this appeal concerns whether certain of Mr. McGregor's business activities constitute unlawful gambling or a lawful sweepstakes operation.

8. Under Canon 3(1) of Alabama's Canons for Judicial Ethics,

> "(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . . "

9. As this Court explained in *Ex parte Duncan,* 638 So. 2d 1332 (Ala. 1994):

Appendix H

> "Under Canon 3(C)(1), Alabama Canons of Judicial Ethics, recusal is required when 'facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge.' *Acromag-Viking v. Blalock,* 420 So.2d 60, 61 (A1a.1982). Specifically, the Canon 3(C) test is: 'Would a person of ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?' *Matter of Sheffield,* 465 So.2d 350, 356 (Ala.1984). The question is not whether the judge was impartial in fact, but whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality – whether there is an appearance of impropriety. *Id.*; see *Ex parte Balogun,* 516 So.2d 606 (Ala.1987); see, also, *Hall v. Small Business Administration,* 695 F.2d 175 (5th Cir.1983).

Duncan, 638 So. 2d at 1334 (emphasis added).

10. Therefore, it is clear that the Canons of Judicial Ethics mandate that a justice cannot sit on a case involving the issue of whether certain activities constitute unlawful gambling when one of his major political campaign platforms is against gambling.

11. Furthermore, the neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.

> "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards

the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. *See Carey v. Piphus,* 435 U.S. 247, 259-262, 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Mathews v. Eldridge,* 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' *Joint Anti-Fascist Committee v. McGrath,* 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

"The requirement of neutrality has been jealously guarded by this Court. . . . The Court stated that the Due Process Clause would not permit any 'procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.' 273 U.S., at 532. . . . We have employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure. Indeed, 'justice must satisfy the appearance of justice,' *Offutt v. United States,* 348 U.S. 11, 14 (1954), and this 'stringent rule may sometimes bar trial by judges who have no actual

> bias and who would do their very best to weigh the scales of justice equally between contending parties,' *In re Murchison,* 349 U.S. 133, 136 (1955). *See also Taylor v. Hayes,* 418 U.S. 488 (1974)."

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

12. The United States Supreme Court recognizes that the authority of the judicial system rests in the public's faith in the impartiality and nonpartisanship of its members:

> "Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe. *See Mistretta v. United Siates,* 488 U.S. 361, 407, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) ('The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.'). As the Minnesota Supreme Court has recognized, all legal systems – regardless of their method of judicial selection – 'can function only so long as the public, having confidence in the integrity of its judges, accepts and abides by judicial decisions.' *Complaint Concerning Winton,* 350 N.W.2d 337, 340 (1984).

Republican Party v. White, 536 U.S. 765, 817-818 (2002).

13. A judge must be a neutral decision maker and not an advocate. The issue presented by this motion is not about political speech. It is about a stated and demonstrated actual bias and prejudice to a participant and an issue in a legal case before this Court.

14. Chief Justice Nabers has gone far beyond merely stating his "personal" opinion against gambling. He has advocated through the public media his judicial hostility

against gambling and gambling interests. *See* Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech,* 104 Colum.L.Rev. 563, 568-569 (2004) ("First, judges must be disqualified from cases about which they have publicly commented and expressed a desired outcome. Second, judges must be disqualified from cases involving parties about whom they have previously expressed extreme animosity. Third, judges must be disqualified from cases involving issues about which they have previously stated an intention to violate the law.").

15. Recusal is necessary when "facts are shown which make it reasonable for members of the public, or a party, or counsel opposed to question the impartiality of the judge." *In re Sheffield,* 465 So. 2d 350, 355-56 (Ala. 1985) (quoting *Acromag-Viking v. Blalock,* 420 So. 2d 60, 61 (Ala. 1982)).

> "The test that remains applicable at all times, the answer to which always depends upon the 'totality of circumstances' of each case, is whether a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find that there is a reasonable basis for questioning the judge's impartiality."

Dothan Personnel Bd., 831 So. 2d at 11 (citing *Sheffield,* 465 So. 2d at 356).

FOR THESE REASONS, Chief Justice Nabers is requested to disqualify and recuse himself from this case. This disqualification and recusal includes any decision

relating to these matters including the assignment or transfer of this matter to another justice.

Respectfully submitted,

/s/ J. Mark White
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EXHIBIT 4

IN THE SUPREME COURT OF ALABAMA

1050625

David Barber, as District Attorney of Jefferson County, Alabama v. Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course et al. (Appeal from Jefferson Circuit Court CV-05-7684).

1050857

David Barber, in his capacity as District Attorney for the Tenth Judicial Circuit of Alabama v. Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course; Mike Hale; and Innovative Sweepstakes Systems, In. (Appeal from Jefferson Circuit Court CV-05-7684).

AMENDMENT TO MOTION TO DISQUALIFY CHIEF JUSTICE DRAYTON NABERS

ON OCTOBER 26, 2006, PETITIONER Jefferson County Racing Association, Inc., d/b/a The Birmingham

Appendix H

Race Course ("JCRA") filed a Motion requesting Chief Justice Drayton Nabers to disqualify and/or recuse himself from having any participation in any matter with regard to the above-styled cases. That motion is still pending[1]. However, since that Motion was filed, Christian Action Alabama has released its "voter's guide" which makes this amendment necessary and proper.

1. Chief Justice Nabers has publically indicated that he opposes the "establishment of gambling." The recently released Christian Action Alabama 2006 General Election Voter Guide reflects that Chief Justice Nabers "agrees" on the issue of "oppose establishment of gambling." *See* Exhibit A, located at http://www.ccbama.org/VoterGuides/VoterGuideMainWeb.pdf (as accessed November 6, 2006).

2. Justice Nabers' stated position on the establishment of gambling was made in response to a question posed by Christian Action Alabama, formerly known as the Christian Coalition of Alabama. This same group had representatives present throughout the trial of this case

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[1] Four days after Petitioner's motion to disqualify/recuse was filed in these cases, in an unprecedented press release, Chief Justice Nabers announced that he was not participating in Exxon-Mobile's appeal of the largest verdict in Alabama history based on his prior personal involvement as state finance director in 2003-2004. The Exxon case has been pending before the Alabama Supreme Court since April of 2004. No recusal/disqualification request had been filed in the Exxon case. "Nabers' campaign spokesman, Clay Ryan, said he assumed the Supreme Court issued the announcement Monday because 'the honor of the court is being called into question in-a series of campaign ads.'" Associated Press, October 30, 2006, *See* "Chief justice steps aside from Exxon Mobil appeal," http://www.al.com/newsflash/regional/index.ssf?/base/news-25/1162234153195930.xml&storylist=alabamanews (as accessed November 6, 2006).

and was specifically referenced in the testimony of Sheriff Hale's expert witness, Robert Sertell. In fact, Mr. Sertell admitted that he had been sitting with two representatives of the Christian Coalition, Dan Ireland and Eric Johnston, during the trial and before he was called to the stand to offer his testimony on behalf of Sheriff Hale. Mr. Sertell further admitted that he had conversations about the Birmingham Race Course with John Giles of the Christian Coalition. Mr. Sertell admitted that those conversations took place before his deposition in the case. Mr. Sertell further admitted that he had been referred to as an "undercover expert" by the Christian Coalition's Mr. Giles in a letter to Attorney General Troy King dated December 22, 2005 – the day of the raid on the Birmingham Race Course sweepstakes operation. In short, the Christian Coalition, (now Christian Action Alabama) has been intimately involved in this case.

3. The position of Christian Action Alabama is stated on its web site:

> "Gambling has been demonstrated to be destructive to individual lives, families, businesses and society as a whole. Gambling preys upon our youth, the elderly, minorities and those with less education. Millions of Americans are problem or pathological gamblers, producing huge financial and social costs. Whether a lottery, video gambling or any other form of gambling, Christian Action Alabama is unwilling to risk the life of one individual or the destruction of one family."

http://www.ccbama.org/issues/gambling.asp (as accessed November 6, 2006).

4. Christian Action Alabama is totally opposed to any form of gambling:

" – What's so bad about gambling?

"There are thousands of broken families and shattered lives that can personally attest to the destructive effects of gambling. Besides these personal accounts, many scientific studies have reached the same conclusion: Gambling is destructive to individuals, families and society. In the late 90's the U.S. Congress commissioned a study to examine the social and economic impacts of gambling on states, tribes, communities and individuals. The results of this 2-year study were released by the National Gambling Impact Study Commission (view the report). In addition to this major study, a separate study was commissioned to examine "in the currently expanding gambling environment, the number or proportion of pathological gamblers in the United States is increasing and the possible effects of pathological gambling on individuals, families, and communities." The National Research Council research result estimated that in a given year, 1.8 million adult and at least 1.1 million adolescents are pathological gamblers (view the report).

* * *

" – Why do you oppose a state Lottery?

"Many books and scientific studies have demonstrated the inability for lotteries to deliver what they promise. In fact, most states with lotteries see very little increase (and often a decrease in growth in revenue for selected budget items (education normally). As a form of gambling, lotteries

are also destructive, preying on the poor (as a voluntary regressive tax).

* * *

" – How about casinos?

"Casinos are one of the most destructive entities a state can authorize. They are a breeding ground for pathological gamblers, with a full spectrum of gambling options. Besides the impact upon individuals and families, crime and corruption are strongly associated with casinos.

* * *

" – What is video gambling?

"Video gambling is a form of gambling that is particularly addictive. Known as the 'crack cocaine' of gambling, individuals literally sit for hours inserting money into box with lights and sounds, thinking that their 'skill' is important in winning. In truth, video gambling machines are controlled by software and are programmed to 'pay out' at a certain level.

* * *

" – Is Bingo really so bad?

"Bingo, as used by the gambling industry, is simply a sanitized word for 'video gambling'. Articles by the well-known gambling attorney, I. Nelson Rose makes this clear (Is It Bingo, Or a Slot Machine?, Caution – Bingo May Be Hazardous to Your Health, & Bingo – Without the B, I, N, G, or O). Video gambling is one of the most addictive

forms of gambling available (known as the "crack cocaine of gambling").

http://www.ccbama.org/issues/gambling_getinformed.asp#videogambling (as accessed November 6, 2006).

5. Chief Justice Nabers has taken a political and ethical posture against gambling, has made his views public and has made his anti-gambling position a basis of why he should be elected Chief Justice of the Alabama Supreme Court. This stance is indicative of a bias that could squarely impact the parties, interests, and issues in these appeals.

6. THEREFORE, as stated in Petitioner's original Motion to Disqualify, it is clear that the Canons of Judicial Ethics mandate that a justice cannot sit on a case involving the issue of whether certain activities constitute unlawful gambling or a legal sweepstakes operation when one of his political campaign platforms is against gambling. Chief Justice Nabers must disqualify/recuse himself from the above-styled cases.

7. If Chief Justice Nabers refuses to disqualify/recuse himself, the remaining seven[2] Justices of the Alabama Supreme Court must act to disqualify/recuse Justice Nabers[3].

---

[2] Justice Stuart is not qualified by ethical disposition to vote on the matter of Justice Naber's recusal/disqualification.

[3] Recusal is a matter properly submitted first to the Justice whose recusal is sought, and only thereafter to the entire Court. *See Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060, 1089 (Ala. 1984), *vacated on other grounds*, 475 U.S. 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1996).

The honor and credibility of this Court is at stake.

Respectfully submitted,

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[EXHIBIT A reproduced at App. 105 *infra.*]

EXHIBIT 5

IN THE SUPREME COURT OF ALABAMA

1050625

David Barber, as District Attorney of Jefferson County, Alabama v. Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course et al. (Appeal from Jefferson Circuit Court CV-05-7684).

1050857

David Barber, in his capacity as District Attorney for the Tenth Judicial Circuit of Alabama v. Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course; Mike Hale; and Innovative Sweepstakes Systems, In. (Appeal from Jefferson Circuit Court CV-05-7684).

Appendix H

SUPPLEMENT TO MOTION TO DISQUALIFY CHIEF JUSTICE DRAYTON NABERS

The Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course ("JCRA") filed a "Motion to Disqualify Chief Justice Drayton Nabers" on October 26, 2006. Inadvertently omitted from that motion was the news article described as Exhibit A, Eric Valesco, *Gambling money, false ad claims fly*, *The Birmingham News*, October 25, 2006, and referenced in paragraph 4 of the motion.

Attached hereto is Exhibit A which the JCRA requests this Court to accept and include as a part of the Motion to Recuse.

Respectfully submitted,

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EXHIBIT A

[LOGO]

The Birmingham News

Gambling money, false ad claims fly

Wednesday, October 25, 2006

ERIC VELASCO
News staff writer

Alabama's Supreme Court chief justice race is boiling, with incumbent Drayton Nabers Jr. accusing challenger Sue Bell Cobb of taking gambling money, and Cobb claiming Nabers was forced to pull a false ad.

The nation's most expensive state Supreme Court race is getting more expensive. Both sides in the tight race plan more TV ads for the final two weeks before the Nov. 7 election.

So far, Cobb and Nabers have spent almost $2 million on TV ads, according to the Brennan Center in New York, which tracks ad spending in court races nationwide.

The candidates promise clean campaigns but accuse each other of violating the pledges.

"The negative ads are going to continue," said Larry Powell, professor of communications at the University of Alabama at Birmingham and a former political consultant. "The only question is: Are they going to continue right up to Election Day?"

Tuesday, Cobb renewed her call for Nabers to sign a State Bar of Alabama committee agreement on ethical campaigning. She also said she was disgusted by Nabers' television ads.

"The people of Alabama are sick of this and we are, too," said her campaign manager, Sabrina Lofton. "We will continue our message of qualifications and experience, because that's what this race should be all about."

Nabers' campaign responded by accusing Cobb of violating judicial ethics in her own TV ads by lying about her opponent. Nabers issued his own pledge to run an ethical campaign but reserved the right to respond to attacks.

"It is the height of hypocrisy to talk about campaign pledges when they are knowingly running ads that are untruthful," said Nabers' campaign manager, Clay Ryan. "We consistently offer hard evidence in our campaign ads. I have yet to see that from Judge Cobb's campaign."

Gambling money:

Nabers' latest ad says Cobb accepted money from gambling interests – Birmingham Race Course owner Milton McGregor; the Poarch Creek Indians and PCI Gaming,

which run three Alabama casinos; and Greenetrack, which offers video gaming.

Cobb received at least $34,000 from those sources, directly or through political action committees run by lobbyist John Teague, Nabers' camp said Tuesday.

That figure includes almost $8,000 of office space from Jemison and Mendelsohn, a law firm that has represented the Poarch Creek Indians and whose principal partner, Mays Jemison, is treasurer for Poarch PAC.

David Browne, Cobb's media consultant, said it is hard to link PAC contributors to the candidates.

"Who else gave them money?" he said. "We got a cheek in the mail. Honest to goodness, we don't know who gave money to those PACs."

Ryan, Nabers' campaign manager, said the gambling connection in some cases "is crystal clear."

For example, from April to July, Teague's Please PAC received $20,000, all from Greenetrack. PCI Gaming and Poarch PAC, state campaign disclosure forms show. Please gave $5,000 to Cobb in late June and sent the rest to other PACs.

Ryan said Nabers' campaign returned a $12,500 contribution two weeks ago from a PAC run by lobbyists Joe Fine and Robert Geddle, which had received $100,000 from McGregor.

"As soon as we learned we had possibly received gambling money, we returned it and we plan to return any contributions like it," Ryan said.

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Disputes ad pull:

Ryan also disputed the contentions in Cobb's newest ad that Nabers had to pull a TV because it was false. The ad, which was about differences between Cobb and Nabers, actually had ended its run time, he said.

Cobb's ad also said Nabers' campaign is "backed by millions in oil money" while flashing the figure $990,000 on the screen. Ryan said that was a false link to the $990,000 in TV ads the American Taxpayers' Alliance ran before the June primary, which mostly promoted Nabers.

Nabers has said his campaign had nothing to do with the ATA ads, and he disavowed them.

Browne pointed out that, while the ATA has not disclosed donors for the pre-primary ads, it has received money in the past from energy companies and from a Maryland race track.

Powell of UAB, the former political consultant, said the mudslinging may continue until the election.

"Traditionally they go positive the last weekend so voters can get the negative taste out of their mouths," he said. "But that may not happen this time. Both sides have the money, and it's a hotly contested race. The polls I've seen say its too close to call."

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Appendix H

EXHIBIT 6

IN THE SUPREME COURT OF ALABAMA

1050625

David Barber, as District Attorney of Jefferson County, Alabama v. Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course et al. (Appeal from Jefferson Circuit Court CV-05-7684).

1050857

David Barber, in his capacity as District Attorney for the Tenth Judicial Circuit of Alabama v. Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course; Mike Hale; and Innovative Sweepstakes Systems, Inc. (Appeal from Jefferson Circuit Court CV-05-7684).

AFFIDAVIT OF MILTON E. MCGREGOR

STATE OF ALABAMA)
:
COUNTY OF JEFFERSON)

Before me, the undersigned authority, a Notary Public in and for said County in said State, personally appeared Milton E. McGregor, and after first being duly sworn by me, deposes and says as follows:

1. I am over the age of twenty-one (21). I am a citizen of the United States of America and a citizen of the State of Alabama.

2. I am generally familiar with the facts in the case of *David Barber, as District Attorney of Jefferson County, Alabama v. Jefferson County Racing Association, Inc., d/b/a The Birmingham Race Course et al.*, Circuit Court

of Jefferson County, Alabama, Case No.: CV-05-7684, and I attended all trial proceedings.

3. On October 26, 2006, counsel for the Appellee filed a Motion to Disqualify Chief Justice Drayton Nabers based on his private and public comments during his political campaign in which he proclaimed he has "fought against the gambling bosses" and mentioned me by name in his ads. Additional motions were filed to disqualify Justice Jacquelyn Lyn Stuart on November 6, 2006, and Justice Michael Bolin and Justice Patti Smith on November 8, 2006.

4. During the week of October 23, 2006, I was contacted by members of the media, including the *Associated Press,* and was told that they had information that the Alabama Supreme Court was going to rule on the appeal of this case on October 27, 2006. I am also aware that the attorneys in this case were contacted by members of the media who had information that the opinion was going to be rendered on Friday, October 27, 2006.

5. It was indicated to me and a number of others that the Supreme Court was going to rule adverse to my position and that Chief Justice Nabers had participated in all deliberations, meetings and the decision to deny the motion for oral argument leading up to the opinion and that he had in fact voted on the case. Subsequent to that time, members of the media have advised me they learned that the opinion was withdrawn. When the opinion was ultimately issued on December 1, 2006, it did not indicate the extent of Chief Justice Nabers' participation in this case.

6. Upon information and belief, I believe Chief Justice Nabers met in person and/or spoke by telephone with Governor Bob Riley who advocated the reversal of Judge Scott Vowell's opinion. Governor Riley has publicly stated his opposition to the sweepstakes operation and has directed and brought to bear the filing of amicus curie briefs in the appeal. Additionally, Governor Riley and Chief Justice Nabers made this an issue in their respective political campaigns.

7. Upon information and belief, I believe the timing for the original release of the opinion was designed to enhance the political chances of Governor Riley, Chief Justice Nabers, and other members of the Supreme Court who were up for reelection.

8. I am aware that on the day before the election, Chief Justice Nabers and Governor Riley toured the State of Alabama together by airplane advocating their own and each other's reelection.

9. Upon information and belief, I also have reason to believe that Chief Justice Nabers made his position regarding the case known to other members of the Court, brought to bear influence upon other members of the Court to adopt his position, and discussed the political ramifications of the decision with other members of the Court and with political consultants and operatives.

10. The Motion to Disqualify Chief Justice Nabers has not been ruled on as of the date of this affidavit although the entire Court, with the exception of Chief Justice Nabers, voted on the non-recusal decisions of Justices Stuart, Smith and Bolin by Court Order dated December 1, 2006.

11. I do not believe any person of ordinary prudence who is aware of all of the facts known to these Justices would deem it reasonable to consider them to be impartial in their consideration of this case.

FURTHER AFFIANT SAYETH NOT.

/s/ Milton E. McGregor
Milton E. McGregor

Sworn to and subscribed before me on this the 12th day of December, 2006.

/s/ Linda Gainer Pittman
Notary Public
My Commission expires: 7-28-10

[NOTARIAL SEAL]

EXHIBIT 7

Office of the Governor
BOB RILEY
Governor

[SEAL]
STATE OF ALABAMA

Press Office

June 01, 2006

Governor Riley Files Brief Asking Alabama Supreme Court to Rule Internet Sweepstakes Scheme Illegal

📖 Read the Amicus Curiae brief filed by Governor Riley today.

MONTGOMERY – Governor Bob Riley today filed an amicus curiae brief asking the Alabama Supreme Court to rule that the sweepstakes scheme at the Birmingham Race Course is illegal and unconstitutional.

Appendix H

Earlier this year, Jefferson County Circuit Court Judge Scott Vowel ruled the sweepstakes scheme at the race course is a "sham" but legal. Jefferson County District Attorney David Barber has filed an appeal in that case and Governor Riley has joined in the appeal.

"The people of Alabama have spoken on this issue time and time again. They are opposed to lotteries and the expansion of gambling. This scheme at the race track is a lottery and it's illegal. That's what I'm asking the Supreme Court to decide so we can stop illegal gambling in Alabama," Governor Riley said.

In the brief he filed today, the Governor noted that Section 65 of the Alabama Constitution prohibits lotteries and any scheme "in the nature of a lottery."

"The public policy against lotteries could not be more clearly and unequivocally expressed. The overwhelming evidence indicates that the sweepstakes operation at the Birmingham Race Course is a prohibited scheme in the nature of a lottery – a de facto lottery established to evade the law that even the trial court recognized was a 'sham,'" Governor Riley's amicus curiae brief states.

"The trial court's ruling allows that evasion to succeed through an exceedingly narrow" interpretation that conflicts with the state's Constitution, the brief continues.

For more contact information, visit Governor Bob Riley's Web Site: http://www.governor.alabama.gov/

Alabama State Agency Directory | Alabama State Employee Directory

APPENDIX I – JEFFERSON COUNTY RACING ASSOCIATION, INC.'S BRIEF IN SUPPORT FOR REHEARING FILED IN THE ALABAMA SUPREME COURT ON DECEMBER 22, 2006

Nos. 1050625 and 1050857

IN THE SUPREME COURT OF ALABAMA

DAVID BARBER, in his capacity as District Attorney for the Tenth Judicial Circuit

Appellant,

v.

JEFFERSON COUNTY RACING ASSOCIATION, INC. d/b/a The Birmingham Race course; INNOVATIVE SWEEPSTAKES SYSTEMS, INC.,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY CIVIL ACTION NO. CV-05-7684

BRIEF IN SUPPORT OF APPLICATION FOR REHEARING OF APPELLEE JEFFERSON COUNTY RACING ASSOCIATION, INC. D/B/A THE BIRMINGHAM RACE COURSE

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STATEMENT REQUESTING ORAL ARGUMENT

The Jefferson County Racing Association, Inc. D/B/A The Birmingham Race Course ("JCRA") respectfully requests oral argument on its Application for Rehearing. In addition to issues relating to whether or not this Court's ruling reached a correct result on the merits, this Application for Rehearing involves the fundamental issue of whether JCRA received a hearing of the appeal by an "impartial and disinterested tribunal," which all litigants are entitled to under the Constitution of The United States. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."). Moreover, it also concerns the equally important question of whether four members of the Court complied

with their obligations under the Alabama Canons of Judicial Ethics when they refused to recuse themselves from hearing this matter.

Oral argument should first be heard by this Court in relation to the issue of the non-recusals of certain justices and the consequent violation of JCRA's due process rights. Upon rehearing being granted, the issues on the merits should be orally argued before a neutral Court specifically appointed to hear this appeal.

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STATEMENT OF THE ISSUES

1. Did the participation of Chief Justice Nabers in this appeal, who ran campaign ads calling the majority owner of JCRA, a party in the pending appeal, a "casino boss", and who used the Voter Guide of the Alabama Christian Action to state his anti-gambling positions, violate Canon 3.C(1) of the Alabama Canons of Judicial Ethics ("the Canons") and JCRA's due process rights?

2. Did the participation of Justices Bolin, Smith, and Stuart – who had used the Voter Guides of the Alabama Christian Coalition, or its successor organization, Christian Action Alabama, to propagate their anti-gambling positions – violate Canon 3.C(1) and JCRA's due process rights?

3. Are the due process rights of JCRA – and potentially those of other litigants as well – violated by this Court's acquiescence in the position taken by Justice Bolin that *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), allows for unfettered free speech by a trial or appellate judge, without a concomitant responsibility for recusal, where the speech in question would cause a reasonable person to doubt the impartiality of such judge?

4. Does a complete rehearing of the case by a specially constituted neutral appellate court provide the only clear and certain remedy for curing the violation of JCRA's due process rights and the circumvention of Canon 3.C.(1) that would otherwise result from this case?

Appendix I

ARGUMENT[1]

I. THE PARTICIPATION CHIEF JUSTICE NABERS IN THE COUR' 'S DECISION-MAKING PROCESS VIOLATED JCRA'S DUE PROCESS RIGHTS AS WELL AS CANON 3.C.(1).

Alabama Canon of Judicial Ethics 3.C.(1)[2] states:

> A judge should disqualify himself in a proceeding in which . . . his impartiality might reasonably be questioned, *including but not limited to* instances where:
>
> > (a) he has personal bias or prejudice concerning a party . . . "

Disqualification is *required* under Canon 3.C(1) when "'facts are shown which make it reasonable for members of the public, or a party, or counsel opposed to question the impartiality of the judge.'" *In re Sheffield,* 465 So.2d 350, 355-56 (Ala. 1985) (quoting *Acromag-Viking v. Blalock,* 420 So. 2d 60, 61 (Ala. 1982). Disqualification is thus not limited to circumstances where the facts demonstrate the judge has an actual bias, but includes all situations where the facts demonstrate that reasonable persons would question the judge's impartiality.

Here, JCRA moved for Chief Justice Nabers to disqualify or recuse himself under this Canon and on due

---

[1] JCRA incorporates the Statement of Facts in its Application and the attached evidentiary materials, and also adopts the arguments in the brief of Appellant Innovative Sweepstakes Systems, Inc., in support of grounds 11.a.-11.d. of JCRA's Application.

[2] The Canons are not simply suggestive, but have "the force and effect of law." *In re Sheffield,* 465 So.2d 350, 355 (Ala. 1985).

process grounds based upon the bias evidenced by (i) disparaging comments made against the majority owner of JCRA, (ii) the contents of his advertisements in his recent election campaign, and (iii) his statements in the Christian Action Alabama "Voter's Guide" agreeing with that organization's position against all forms of gambling, all of which were publically disseminated while this case was on appeal. *See* Ex. 3, 4, 5. These facts, taken together, demonstrate that he either had an *actual* bias or prejudice against JCRA, or that a reasonable person would question his impartiality.[3] Thus, it is beyond dispute that Chief Justice Nabers' participation in the appeal violated Canon 3.C.(1), and requires his disqualification as well as the vacation of the Court's December 1, 2006 opinion (the "Opinion") tainted by his actual, if not reported, participation.

A. Chief Justice Nabers did not recuse or disqualify himself and he participated in this Appeal.

Despite taking a public position against even legal forms of gambling, despite disparaging the majority owner of the JCRA as a "casino boss," and despite criticizing his political opponent for accepting campaign contributions from that person, Chief Justice Nabers did not recuse or

[3] As discussed below, the test is *not* whether the judge subjectively believes himself to be impartial despite facts evidencing bias, but whether a "reasonable person" with knowledge of the facts would find a reasonable doubt concerning the judge's impartiality. *Ex parte City of Dothan Pers. Bd.*, 831 So.2d 1, 11 (2002); Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges, §§ 5.6.2 and 5.6.4 (2005).

disqualify himself in this appeal involving the legality of JCRA's sweepstakes operation. Instead, he and the Court ignored the motions and declined to make public his participation in the appeal. JCRA contends, on information and belief, that Chief Justice Nabers "participated in all the Court's deliberations, meetings . . . and that he had in fact voted on the case." *See* Ex. 6. JCRA further contends "that Chief Justice Nabers made his position regarding the case known to other members of the Court, brought to bear influence on other members to adopt his position, and discussed the political ramifications of the decision with other members of the Court and political consultants and operatives." *See* Ex. 6. If true, Chief Justice Nabers unquestionably influenced the outcome of the appeal and thereby created an indeterminate but material violation of JCRA's right to due process of law.

B. JCRA's constitutional right to due process of law was violated.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). Thus, Chief Justice Nabers' involvement in this appeal violated JCRA's right to due process of law under both the Fourteenth Amendment to the United States Constitution and the Alabama Constitution of 1901. *See Stallworth v. City of Evergreen*, 680 So.2d 229, 233-24 (Ala.).[4] The United States Supreme Court addressed a

[4] JCRA reserves a separate Due Process argument, preserved below, that any court action against it, and its property and rights, based upon a judicial rewriting or "reinterpretation" of Alabama

(Continued on following page)

similar due process violation caused by the involvement in an appeal by a biased member of this Court in *Aetna Life Ins. v. Lavoie,* 475 U.S. 813 (1986). Justice Embry refused to recuse himself in an appeal involving issues concerning the tort of bad faith while he was a plaintiff in two lawsuits pending against insurance companies with such claims. 475 U.S. at 816-17. Justice Embry then authored this Court's *per curiam* opinion which affirmed, by a 5-4 vote, a judgment for the plaintiff on a bad faith claim. 475 U.S. at 818. The United States Supreme Court held that Justice Embry's involvement in the appeal violated the defendant's due process rights. The Supreme Court based its ruling on three of its earlier opinions, *Tumey v. Ohio,* 273 U.S. 510 (1927); *In re Murchison,* 349 U.S 133 (1955); and *Ward v. Village of Monroeville,* 409 U.S. 57 (1972), which together established that a judge cannot be permitted to rule on cases where he or she has an interest in the outcome such that it creates a situation "'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" 475 U.S. at 822 (quoting *Ward,* 409 U.S. at 60).

The Court held that because of his claims, Justice Embry had a direct interest in the appeal and his "participation in the case violated [the] appellant's due process rights" because his "sitting on then case before the Supreme Court of Alabama '"would offer a possible temptation to the average . . . judge to . . . lead him to not hold

---

criminal law constitutes a deprivation its due process rights. JCRA reserves the right to assert such contentions, and its constitutional rights, in a manner and in proceedings and, as appropriate, in other fora, separate from this Application.

the balance nice, clear and true."'" 475 U.S. at 825 (quoting *Ward,* 409 U.S at 60, and *Tumey,* 273 U.S. at 532). The Court further held that the Due Process Clause required his disqualification even if he had *no bias* and would do his "'very best to weigh the scales of justice equally,'" because in order to "perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Id.* (quoting *Murchison,* 349 U.S. at 136).

Because of Justice Embry's role in the decision, the United States Supreme Court determined that "'the appearance of justice' [would] be best served by vacating the decision and remanding for further proceedings." 475 U.S. at 828. In their concurring opinion, Justices Brennan and Marshall pointed out that the deprivation of the appellant's right to due process "occurred when Justice Embry took part in the deliberations and decision." 475 U.S. at 830. They explained that "the Court's opinion is *not* to be read to suggest that the outcome [i.e., vacating of the opinion] might be different had Justice Embry not provided the necessary fifth vote in the court below." *Id.* (emphasis added). They further explained:

> That fact too is irrelevant – **Justice Embry's participation in the court's resolution of the case, while he was fully aware of his interest in its outcome, was sufficient in itself to impugn the decision.** The description of an opinion as being "for the court" connotes more than merely that the opinion has been joined by a majority of the participating judges. **It reflects the fact that these judges have exchanged ideas and arguments in deciding the case.** It reflects the collective process of deliberation which shapes the court's perceptions of which

> issues must be addressed and, more importantly, how they must be addressed. **And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays apart in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.**

475 U.S. at 830-31 (emphasis added).

Thus, it is irrelevant that Chief Justice Nabers did not cast the deciding vote here, nor record any vote on the Opinion that evinced his behind-the-scenes involvement. His participation alone in the appeal's resolution would itself deprive JCRA of the assurance of impartiality by this Court, notwithstanding the manifest bias of other Justices who did record their active participation. If Chief Justice Nabers participated in any deliberative or procedural aspect of this appeal, this Court, sworn to uphold judicial integrity and the constitutional rights of litigants, must **vacate** the opinion and, as discussed further below, have the appeal decided by a specially appointed court of neutral jurists who can rule without a taint of bias, or the appearance of a lack of impartiality.

Much was said about character and honesty in the recent election campaign for Chief Justice which exposed the bias here in question against JCRA and its principal owner Milton McGregor. Apart from appearances and

rumors that exemplify the adage that "where there is smoke, there is fire", there is no record of the deliberative process of this Court to which JCRA can refer, making it all the more important that this Court must safeguard the citadel of its own integrity and neutrality. With regard to this duty, the French renaissance philosopher, Michael de Montaigne, made some eternally valid observations concerning the common view of mankind "that it should be the worst insult that can be given in words, to reproach us with lying".

> "Would it not also be that this reproach seems to invoke cowardice and lack of courage? Is there anymore obvious cowardice that to deny our own word? **Worse yet, to deny what we know?**
>
> Lying is an ugly vice . . . [that gives] evidence of contempt for God, and at the same time of fear of men . . . **For what can you imagine uglier than being a coward towards men and bold towards God.**

Montaigne, Essays (Franklin Library 1980), p. 379 (emphasis added).

II. THE PARTICIPATION BY JUSTICES STUART, SMITH, AND BOLIN VIOLATED JCRA'S DUE PROCESS RIGHTS, AS WELL AS CANON 3.C.(1).[5]

JCRA moved to have Justices Stuart, Smith, and Bolin disqualify or recuse themselves under Canon 3.C.(1), and on due process grounds, based upon the bias they had demonstrated toward JCRA through their statements in the 2004 Christian Coalition Voter Guide and the 2006 Christian Action Alabama Voter Guide, agreeing with those organizations' opposition to all forms of gambling, which were made as a part of their respective election campaigns. *See* Ex. 1, and 2. These Justices declined to recuse or disqualify themselves, and released individual Statements of Nonrecusal attached to the Opinion.

A. Justice Stuart's stated reason for nonrecusal.

In her Statement of Nonrecusal, with which Justice Smith concurred, Justice Stuart quoted the text of Canon 3.C.(1) and emphasized only the text of subsection (a) concerning instances where a judge "has *a personal bias or prejudice concerning a party,. . . .*" Opinion at 44. Justice Stuart declined to recuse herself because, apparently, she believes a judge's publicly-expressed, pre-conceived opinions regarding important social issues of the day may never be a basis for recusal. She concludes that she need not recuse here because she had no bias against any party,

[5] The argument in this section also applies to all the members of this Court that concurred in the Order denying the motions for the recusal or disqualification of Justices Stuart, Smith, and Bolin.

stating: "Because my personal opinions do not influence my decisions as a Justice of this Court, I decline to recuse myself." *Id.* at 45. As noted below, however, Justice Stuart fails to recognize certain important distinctions which reveal the inadequacy of her reasoning.

B. Justice Smith's stated reason for non-recusal.

In her Statement of Nonrecusal, to which Justice Stuart concurred, Justice Smith agreed with the reasons for nonrecusal stated by Justices Stuart and Bolin, and stated that she was writing separately to "emphasize" that she has a "constitutional duty to decide cases" which she must balance with the "requirement of impartiality." However, other than quoting from Justice See's statement of nonrecusal in *Dunlop Tire Corp. v. Allen,* 725 So.2d 960 (Ala. 1998), regarding the duty to decide cases, Justice Smith did *not* explain how that duty overrides the duty to recuse based upon the appearance of bias evident here.

C. Justice Bolin's stated reason for non-recusal.

In his Statement of Nonrecusal, to which Justices Stuart and Smith concurred, Justice Bolin explained that his non-recusal was based upon the United States Supreme Court's opinion in *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), which involved a First Amendment challenge to a canon of the Minnesota Code of Judicial Conduct that prohibited judicial candidates from announcing views on disputed legal or political issues. Because the Supreme Court held in *White* that the canon

at issue violated judicial candidates' First Amendment right to freedom of speech, justice Bolin states that *White* gave him and other judicial candidates the right to announce views to the public through "answers in response to specific questions on a questionnaire." Opinion at 48-49. However, Justice Bolin's focus on a judge's right to free speech ignores the concomitant responsibility for recusal under circumstances where such speech would cause a reasonable person to question a judge's impartiality. While Justice Bolin acknowledged that his recusal would be required where his "'impartiality might reasonably be questioned,'" *Id.* at 50, he improperly focused solely on his claimed lack of actual bias. Justice Bolin attempted to demonstrate his lack of bias by stating that "gambling is illegal in this State," and comparing his personal opposition to gambling to a person's natural opposition to heinous crimes such as "murder, rape, and robbery." *Id.* at 50-51. However, he neglected to note that not all forms of gambling are illegal in this state, and specifically that sweepstakes are legal, which is the core issue in this case. Thus, his assertion of impartiality further evidences a lack of impartiality regarding the issue on appeal.

D. The three Justices' Statements of Nonrecusal do not properly apply Canon 3.C.(1).

A recurring theme in Statements of Nonrecusal of Justices Stuart, Smith, and Bolin is the avoidance of the requirement under Canon 3.C.(1) that a judge must recuse or disqualify himself if the facts show that a reasonable person would question his or her impartiality. For example, Justice Stuart avoids this standard by equating the requirement for recusal under Canon 3.C.(1) solely with

the existence of an actual bias, *overlooking* that the Canon's focus is on the broader test of whether a judge's "impartiality might reasonably be questioned." Justice Stuart bases her non-recusal on her subjective belief that she shows no bias. Justice Bolin's non-recusal statement contains a similar subjective conclusion that he bears no bias and merely enforces the law. Justice Smith's concurrence in these nonrecusal statements adopts this improper analysis. The test under this Canon is not a subjective one dependent upon whether the judge believes he or she will rule impartially, but whether a reasonable person, knowing all the facts, would objectively question the judge's impartiality. *In re Sheffield, supra.* One respected author has explained:

> The "appearance of bias" standard, however, does not contemplate . . . that when a judge is convinced of his [or her] ability to preside impartially he [or she] may properly deny a disqualification motion. **On the contrary, the judge's actual state of mind or lack of impartiality is considered beside the point because a judge who is convinced of his [or her] own impartiality, as well as the purity of his motives, may nonetheless act in manner that would lead a reasonable person to believe he is biased.**

Flamm, *supra,* § 5.6.2 (emphasis added; footnotes omitted). Thus, Justices Stuart, Smith, and Bolin's subjective belief that their personal opinions do not influence their decisions is irrelevant to the fundamental issue under Canon 3.C.(1) of whether a reasonable person might question their impartiality.

The proper analysis is whether an objective reasonable person would question a judge's impartiality under these circumstances, where there is a vast difference between a judge's own privately-held opinions and those which he or she makes public during a contested political campaign. This was explained by Justice Souter in his nomination hearing when he refused to respond to questions about his opinions on certain issues.

> Anything which substantially could inhibit the court's capacity to listen truly and listen with as open a mind as is humanly possible to have should be off-limits to a judge. Why this kind of discussion would take me down a road **which I think is unethical for me to follow** is something that perhaps I can suggest. . . .
>
> **[I]t is much easier to modify an opinion if one has not already stated it convincingly to someone else. With that in mind, can you imagine the pressure that would be on a judge who had stated an opinion, or seemed to have given a commitment** in these circumstances . . .

Nomination Hearing of Justice Souter, 101st Congress, 194 (1990) (emphasis added). Likewise, in his more recent confirmation hearing, Chief Justice Roberts also explained how a judge making public comments on issues likely to come before him or her undermines the integrity of our judicial system.

> **And if you start stating views with respect to particular issues of concern** to one Senator, then, obviously, everyone's going to have their list and when that individual nominee, if confirmed, if the bargain is successful from his or

> her point of view and he gets confirmed, **he'll have to begin each case, not with the party's briefs and arguments, but with the transcript of the confirmation hearing to see what he or she swore to**, under oath, was their view in that particular area of the law or particular case. And I think that . . . **would undermine the integrity of the judicial process.**

Nomination Hearing of Chief Justice Roberts, 2005 WL 2237054 (emphasis added). That result occurred here. The public statements of Justices Stuart, Smith, and Bolin in Alabama Christian Coalition voter guides agreeing with opposition to even legal forms of gambling "undermines the integrity of the judicial process" when those Justices failed to recuse themselves in this appeal. JCRA Application at 9-10.

Justice Bolin mistakenly relies upon the Supreme Court opinion in *White* – which recognizes that a judicial candidate's freedom of speech is protected by the First Amendment – because *White* did not address a judge's duty to recuse in cases involving the specific issues on which he or she has spoken; With rights come responsibilities, and with a judge's right to free speech comes a responsibility to recuse under Canon 3.C.(1) in the instances where, based on such statements, a reasonable person would question the judge's impartiality. Surely Justice Bolin, as well as other members of this Court, cannot contend that freedom of speech in an election campaign outweighs the importance of judicial integrity and a litigant's right to due process of law.

III. A COMPLETE REHEARING BY A NEUTRAL COURT IS REQUIRED.

Once this Court holds that its opinion must be vacated because JCRA's right to due process rights was violated, as well as Canon 3.C.(1), the appeal must be decided by a new, neutral court free from bias or the appearance thereof. This Court plainly has the authority and responsibility to appoint a special Supreme Court to decide appeals in instances where it is unable to do so because of disqualifying conflicts. *See, e.g., Mississippi Valley Title v. Hooper,* 707 So.2d 209 (1997) (discussing in footnote 1 the procedure used to appoint a special Supreme Court in that appeal).

Respectfully submitted this 22nd day of December, 2006.

/s/ William M. Slaughter
One of the Attorneys for
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Racing Association, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by United States first class mail, properly addressed and postage prepaid, on this the 22nd day of December, 2006.

Appendix I

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Appendix J

APPENDIX J - EXCERPTS FROM THE RECORD ON APPEAL IN THE ALABAMA SUPREME COURT

Circuit Court No. 05-7684 *Supreme Court No.* 1050625

VOLUME 14
PAGES R532-R682

APPEAL

TO

Supreme Court of Alabama

FROM

CIRCUIT COURT CIVIL DIVISION
JEFFERSON COUNTY
BIRMINGHAM, ALABAMA

DAVID BARBER, AS DISTRICT ATTORNEY
OF JEFFERSON COUNTY

Appellant

vs.

JEFFERSON COUNTY RACING ASSOC INC DBA
THE BHAM RACE COURSE ET AL

Appellee

* * *

[Trial testimony of Robert Sertell]

[649] questions?

A. My apologies.

Q. Okay. That is all right. But the readers that you testified about a minute ago, you told me approximate the readers at issue in this case. Is it your testimony that a reader of a scratch-off sweepstakes promotion would be legal and would not be a gambling device?

A. Again, the circumstance there is different, sir. A reader is a reader. I agree with that. A reader standing alone is not a gambling device. A reader interconnected in a scheme in the way we have here is, in my opinion.

Q. But to the extent the Attorney General is saying that a reader considered as part of a sweepstakes operation is legal, you don't agree with that, do you?

A. That would be correct.

Q. Mr. Sertell, do you know John Giles?

A. Yes, sir.

Q. Do you know Dan Ireland?

A. I do now.

Q. And do you know Eric Johnston?

A. I don't believe so.

Q. He is the gentleman with the goatee [650] you met over here now – there he is.

A. Oh, in that case, then, yes. I didn't know his name.

Q. You have been sitting back there during this trial conversing with those two gentlemen, haven't you?

A. I have.

Q. Okay. And you know John Giles to be a lobbyist, don't you?

A. Yes.

Q. And you are aware that Mr. Giles runs a lobbying organization that has accepted money from Mississippi casinos, aren't you?

A. I know that he runs a lobbying organization. I know that there were allegations of that.

Q. Have you discussed with him the source of his funding, sir?

A. No.

Q. He hasn't told you that he receives money from Mississippi casinos?

A. No.

Q. How long have you known Mr. Giles?

MR. ALFANO: You know, I think he is going too far astray. I don't see how that has [651] anything to do with this case.

THE COURT: Overruled.

A. Sir, I have known him for several years.

Q. (BY MR. BOLTON:) I think you told us you met him in a courtroom.

A. I believe that is correct, yes, sir.

Q. And you have had conversations with Mr. Giles about the Birmingham Race Course, haven't you?

A. Yes, indeed.

Q. When did you have those conversations?

A. Here.

Q. You had conversations before the deposition, did you not, with Mr. Giles about the Birmingham Race Course?

A. Yes.

Q. And when was the first of those conversations, sir?

A. I don't recall. Sometime prior to my contact from the Sheriff's Office.

Q. And what did – who initiated the telephone call, or was it a telephone call?

A. Mr. Giles.

* * *

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Circuit Court No. 05-7684 *Supreme Court No.* 1050625

VOLUME 4
PAGES C601-C800

APPEAL

TO

Supreme Court of Alabama

FROM

CIRCUIT COURT CIVIL DIVISION
JEFFERSON COUNTY
BIRMINGHAM, ALABAMA

DAVID BARBER, AS DISTRICT ATTORNEY
OF JEFFERSON COUNTY

Appellant

vs.

JEFFERSON COUNTY RACING ASSOC INC DBA
THE BHAM RACE COURSE ET AL

Appellee

* * *

[Deposition testimony of Robert Sertell]

[733] dig through my materials to find his name if you would like but I don't recall.

Q. Did you read it?

A. I did.

Q. Did you have any disagreement with anything in it?

MR. ALFANO: Do you have another copy?

MR. REDIKER: (Handing document.)

MR. ALFANO: Thank you.

A. I never approached it from the agree or disagree standpoint, sir.

Q. (BY MR. REDIKER:) On Page 2 of this letter, this is Exhibit 8 I have shown the witness.

(Whereupon, Plaintiffs' Exhibit 8 was marked for identification.)

Q. (BY MR. REDIKER:) This is a letter you saw, right?

A. Yes, sir, it appears to be.

Q. And you read it at that time [734] when you were first shown it, right?

A. Yes, sir, I did.

Q. Did you ever call Mr. Giles and say this letter was wrong in any respect?

A. No.

Q. In Paragraph 2 under the Item 2 on the second page it says, "At that time, our own undercover expert (see Robert Sertell's report dated May 16, 2004) said that approximately ninety percent of all machines in Atmore, Wetumpka and Montgomery were Class 3 machines which are illegal to operate on Alabama soil."

Did you ever call the Christian Coalition and say that you weren't an undercover expert?

A. No, but apparently I could have. I really didn't pay much attention.

Q. Well, you didn't object to Mr. Giles calling you an undercover expert for the Christian Coalition, did you?

[735] A. I didn't object to anything.

Q. Okay.

A. I guess I should follow that to give you an accurate answer by saying I am not, nor have I ever been, their expert nor have I ever been retained or paid by them.

Q. Let's talk about who you have been paid by. Have you ever done any work for any casinos in the South?

A. Yes.

Q. Any in Mississippi?

A. Yes.

Q. What, Harrah's?

A. No, I was an employee of Harrah's at one point, but that was in Atlantic City.

Q. Okay.

A. I built Harrah's slot department in Atlantic City.

Q. Does ha a's have an operation in Mississippi?

A. Yes, they do.

* * *

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Circuit Court No. 05-7684 *Supreme Court No.* 1050625

VOLUME 5
PAGES C801-C1000

APPEAL

TO

Supreme Court of Alabama

FROM

CIRCUIT COURT CIVIL DIVISION
JEFFERSON COUNTY
BIRMINGHAM, ALABAMA

DAVID BARBER, AS DISTRICT ATTORNEY
OF JEFFERSON COUNTY

Appellant

vs.

JEFFERSON COUNTY RACING ASSOC INC DBA
THE BHAM RACE COURSE ET AL

Appellee

* * *

[868] **[LOGO]**

Bob Russell
State Chairman

Christian Coalition of *Alabama*

John W. Giles
President

December 22, 2005

The Honorable Troy King
Attorney General
11 South Union Street
Montgomery, AL 36130

Appendix J

General King:

You have been a friend for a long time, but today I am writing as the President of the Christian Coalition of Alabama (CCA) to the Alabama Attorney General (AG). This letter is written with great consternation about the rapid and out of control expansion of gambling in the State of Alabama, which has occurred under the watchful eye of our top law enforcement agency – The Alabama AG's office. I have members, Board Members, preachers, donors and concerned citizens asking me all the time, "Why isn't anybody stopping this leprosy on our state?" For some time now, I have ignored my passionate feelings about this situation because of our friendship, but as the President of the CCA I must be honest, I am very disappointed with the lack of tenacity and leadership that has been shown in bringing to a halt the cancerous plague of gambling expansion in our state. One of the tenets of our organization is "Protecting our communities from the expansion of gambling." Detailed below are 4 major examples of gambling expansion that have occurred under your tenure as Attorney General.

1. Macon County Bingo

The tour of the Macon County dog track bingo-casino enabled you to earn good media coverage and gave the appearance to the public that the Alabama AG's office was cracking down on gambling. Prior to releasing your results from your press tour, you invited me to a meeting where you chose to focus on the definition of bingo as the centerpiece of your investigative findings. You personally informed me there were several hundred machines operating illegally at Victoryland – validating our public

position that illegal gambling was occurring at this facility. In our meeting I warned against creating a memorandum reflecting your definition of bingo because it is not binding or enforceable. I also pointed out the gambling lawyers are masters at weaving around definitions and creating confusion.

Even after you confirmed to me that hundreds of bingo machines were illegal under your new definition, Victoryland dog track owner Mr. Milton McGregor said in effect he was glad his machines were legal and in compliance (contrary to your position) and that the AG needed to look elsewhere to clean up illegal bingo gambling. No machines were dismantled or opened up on your press tours, no follow-up sting operations were executed, none of the illegal machines were impounded, no arrests were made and the illegal casino operation at the dog track continued operating without interruption. Without explanation, "several hundred" illegal machines identified by your office turned into only six illegal machines as reported. The message conveyed is that the gambling business can break the law, be given a grace period to comply and everyone is happy. If prosecutors used this methodology, no one would ever go to jail and pay for their crime.

Now, I have legislators telling me that Attorney General Troy King has "legitimized" the dog track bingo casino gambling operations by his definition and thus we should tax them, which in effect makes them legal This line of thinking will guarantee the expansion of gambling because the Indians will immediately start construction with Harrah's; for as you know, what is legal in the state is legal on the reservation. As you know, bingo expansion was allowed in Macon County [869] through legislation

introduced by former Representative Johnny Ford. The contents of the bill that passed as a local constitutional amendment allowing bingo in Macon County were factually misrepresented on the floor of both chambers and the bill was fraudulently passed. This legislation also granted the office of the county sheriff the authority to be the sole source of the definition of bingo in Macon County. I have even had legislators tell me Representative Arthur Payne and Dr. Dan Ireland with Alabama Citizens Action Program (ALCAP) approved this legislation. I know for a fact that these fine men, who I trust implicitly, were misled and would not have signed-off on flawed legislation that expanded gambling in Macon County. These men would never approve of the expansion of gambling. The manner in which this bill was passed, the ethical violations surrounding the legislation and the practicality and constitutionality of having one elected official defining bingo needs full examination and explanation. In my view, we need you, as the state's chief law enforcer leading this fact-finding mission. We need your passionate leadership generating possible options and finding viable solutions to this horrific situation in Macon County that is result of the deceit of the entire legislative body and the good people of Macon County.

2. Poarch Band of Creek Indians Illegal Gambling

Like the Victoryland tour, the press tour of the casinos at the Poarch Band of Creek Indian Tribe facilities produced some very good press, but no action. We both knew before your tour that the AG has no jurisdiction over federally recognized tribes. In the same meeting mentioned above, I warned that the media was going to ask

about your tours of the Indian facilities and you confirmed, first to me, and then the media, that you had no jurisdiction. You and Governor Riley went to Washington D.C. to meet with the U.S. Attorney General about the "no action policy" taken by the National Indian Gaming Commission (NIGC) on illegal gambling at the Indian reservation in Alabama. The Indian Gaming Regulatory Act is clear that the NIGC has regulatory authority over tribal gambling.

At that time, our own undercover expert (see Robert Sertell's report dated May 16, 2004) said that approximately 90% of all machines in Atmore, Wetumpka and Montgomery were Class III machines, which are illegal to operate on Alabama soil. The NIGC confirmed to you and the Governor that they knew the Indians in Alabama were operating illegally and they were working with the tribes to get them in compliance. Later news accounts reported the situation had been resolved however this is simply due to the fact that the NIGC is allowing Class III gambling under a fictitious Class II designation. Contrary to how the situation was handled in Alabama, the Texas AG took an Indian Tribe to Federal Court and closed down their facility on almost identical grounds. I personally provided you with the pertinent documents from the Texas proceedings. Like the Texas AG, you could take them to Federal court and close them down, force them into Class II compliance or call on the NIGC daily and apply intense pressure for them to do their job immediately. This illegal gambling operation has continued uninterrupted on Alabama soil and no one is doing anything about it.

3. White Hall Illegal Gambling

I am also quite disappointed with your handling of the illegal White Hall casino bingo operation. You determined the bill authorizing this operation improperly passed the Alabama Legislature, making it illegal in your official legal opinion. Today, they are still in operation as an illegal casino as you seek a "declaratory judgment." The vote to authorize expanded bingo was not submitted to state electors; rather it was submitted only as a local vote. Senator George Callahan had voted against the Legislation and this would have required a statewide vote. I cannot understand why the illegal gambling operation continues. If any expanded operations are to be considered in Whitehall, they must pass again through the legislature before being submitted to a vote. In my view this operation should have been immediately raided, the doors dosed, the machines impounded, criminal penalties enforced and the defendants forced to seek their own injunction to reopen. Action like this would put the burden on those breaking the law; instead, your approach has left them in operations while the court process drags out and illegal gambling continues in White Hall.

4. Illegal Sweepstakes Gambling at the Birmingham Race Course

Most recently, news accounts have reported the launching of sweepstakes gambling at the Birmingham Race Course (also owned by Mr. Milton McGregor). Sweepstakes gambling is at best a new form of subterfuge hiding illegal and unconstitutional gambling. The Birmingham Racing Commission is reported to have developed regulations for governing the sweepstakes now being conducted

at the Birmingham Race Course. It is my understanding these activities have every [870] appearance of unlawful gambling and would be in violation of Alabama's criminal code and § 65 of the Alabama Constitution. Even an AG Opinion issued under your administration on August 9, 2005 confirms that this type of sweepstakes schemes is a lottery as defined in the Alabama Constitution, confirming that it is illegal and unconstitutional. I am aware of the recent meeting in your office at the request of Representative Arthur Payne and Sheriff Mike Hale. I know for a fact that everyone attending that meeting shook their head in disappointment with your tone, disinterest and distancing from the Jefferson County Sweepstakes issue. This morning, there was a raid at the Birmingham Race Track where approximately 1300 machines were seized and removed. This raid was carried out by Sheriff Mike Hale, Jefferson County District Attorney's office and the Federal Bureau of Investigation; more importantly and notably absent from today's historic raid was the Alabama Attorney General's Office. What will now be the Attorney General's office involvement and actions now that others have led the charge?

I would appreciate a written response about these four examples of gambling expansion in our state. The Attorney General's Office needs to clearly outline to the public a plan of action to bring all illegal gambling in Alabama to an immediate halt. I do not feel it would be productive to have you or a staff member call me in response to this letter. I would be willing to visit with you after receiving your written response. We need to communicate to our membership the status of your defined plan of action to

immediately stop the expansion of gambling in the great state of Alabama.

With kindest and personal regards, I remain

Respectfully yours,

/s/ John W. Giles
John W. Giles
President

The Honorable Governor Bob Riley
The Honorable Representative Arthur Payne
Jefferson County District Attorney David Barber
Jefferson County Sheriff Mike Hale
Alabama Pro-Family Organizations
Christian Coalition of Alabama Board of Directors

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Appendix J

Circuit Court No. 05-7684 *Supreme Court No.* 1050625

VOLUME 8
PAGES C1401-C1600

APPEAL

TO

Supreme Court of Alabama

FROM

CIRCUIT COURT CIVIL DIVISION
JEFFERSON COUNTY
BIRMINGHAM, ALABAMA

DAVID BARBER, AS DISTRICT ATTORNEY
OF JEFFERSON COUNTY

Appellant

vs.

JEFFERSON COUNTY RACING ASSOC INC DBA
THE BHAM RACE COURSE ET AL

Appellee

* * *

Appendix J

[1469] **IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA**

JEFFERSON COUNTY RACING ASSOCIATION, INC. d/b/a THE BIRMINGHAM RACE COURSE; and INNOVATIVE SWEEPSTAKES SYSTEMS, INC.,	)	
Plaintiffs,	)	
v.	)	
MIKE HALE, IN HIS OFFICIAL CAPACITY AS SHERIFF OF JEFFERSON COUNTY, ALABAMA,	)	**CIVIL ACTION NO.: CV-05-7684**
Defendant,	)	
INNOVATIVE SWEEPSTAKES SYSTEMS, INC.,	)	
Intervenor.	)	

STIPULATION OF THE PARTIES

(Filed Jan. 31, 2006)

COME NOW Plaintiff Jefferson County Racing Association, Inc. d/b/a the Birmingham Race Course ("Birmingham Race Course"), Plaintiff/Intervenor Innovative Sweepstakes Systems, Inc. ("Innovative") and Defendant Mike Hale, being all of the parties to the above-styled cause, by and through their counsel of record, and stipulate to the following:

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THE PARTIES

Birmingham Race Course

1. The Plaintiff Birmingham Race Course is an Alabama corporation with its principal place of business located in Birmingham, Alabama.

[1470] Innovative Sweepstakes Systems, Inc.

2. The Plaintiff/Intervenor Innovative is a Delaware corporation, is qualified to do business in Alabama, and is a wholly-owned subsidiary of Multimedia Games, Inc. ("Multimedia").

3. Innovative was incorporated to continue Multimedia's implementation, design, and deployment of a legal sweepstakes system to be operated initially at the Birmingham Race Course. Innovative's parent, Multimedia, is a systems, content and technology solutions provider. Multimedia provides computer equipment and software to promote the gaming activities of Native American, charitable gaming establishments, and state, national, and international lotteries.

4. All of Multimedia's business operations are highly regulated by government or quasi-governmental agencies charged with the regulation of gaming activities within the various jurisdictions. Multimedia currently is licensed to do business in, and is in good standing in, 33 jurisdictions. Multimedia is a publicly traded organization and is publicly traded on the NASDAQ exchange, which files its financial statements and reports with Securities and Exchange Commission.

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Sheriff Mike Hale

5. The Defendant Mike Hale is the Sheriff of Jefferson County, Alabama and is sued in his official capacity.

Attorney General Troy King

6. Notice of the claims asserted in this proceeding has been given to the Attorney General of the State of Alabama, Troy King.

[1471] **THE QUINCY SWEEPSTAKES AND CYBERCENTER**

Introduction

7. The Birmingham Race Course's primary business activity is pari-mutuel wagering and racing activities for its patrons. It includes facilities for live horse racing and greyhound racing. The Birmingham Race Course also offers other amenities such as a cyber café, computer center, and business development center that, among other things, provide patrons access to online information about races via the World Wide Web (the "CyberCenter"). The CyberCenter offers Internet access, advanced computing programs, Internet telephony, computer training, and other information services to its patrons. As a result, the Birmingham Race Course is enhancing its operations by providing its patrons access to personal computer terminals ("Computer Terminals") in the CyberCenter. There are 116 personal computer terminals in the CyberCenter.

8. Patrons obtain access to the services of the CyberCenter by purchasing computer access time ("cybertime") at a rate of one (1) dollar for four (4) minutes. In

addition to the use of a broadband Internet connection, patrons can use their purchased cybertime for various printing or communication services, to take computer classes, or to prepare their taxes (*see* Exhibit 1 for complete listing of the services described here in paragraph 22 below). The rates charged by the Birmingham Race Course for access to the CyberCenter are comparable to rates charged by providers of similar computer services at other venues. It is contemplated that new programs and features will be added to the CyberCenter in the future.

9. The rates charged for access to the CyberCenter is fair market value.

10. The Birmingham Race Course offers a sweepstakes called the Quincy's Sweepstakes. For every one (1) dollar of cybertime purchased, the consumer receives 100 entries in the Quincy's Sweepstakes. The results of the respective entries, *i.e.*, whether each is a [1472] winning or losing entry, are predetermined when the consumer purchases cybertime at the point of purchase (the "Point of Sale Terminals"). The Quincy's MegaSweeps official sweepstakes rules adopted by the Jefferson County Racing Commission provide a method by which a sweepstakes entry can be obtained without a purchase.

11. The customer determines whether the sweepstakes entries are winners by reading the results online or on one of the 116 computers in the CyberCenter, calling a toll-free phone number, or by placing the computer access card in one of more than 1,300 electronic readers ("Readers") that display winning and losing entries in an entertaining format, but standing alone are otherwise dumb terminals. Once the results have been revealed, winning

entries are paid. Attached as Exhibit 2 is a power point presentation which plaintiffs contend describes the operation of the sweepstakes offered at the Birmingham Race Course.

History of the Development of the Quincy's Sweepstakes

12. In the second quarter of 2005, the Birmingham Race Course and Multimedia determined that they could utilize a sweepstakes promotion at the Birmingham Race Course.

13. Prior to undertaking the sweepstakes system at the Birmingham Race Course, Multimedia obtained legal analysis from outside counsel to help determine the nature of a system that would be legal in Alabama and comply with all Alabama laws and regulations. Mr. Michael Cox, former General Counsel of the National Indian Gaming Commission and a specialist in gaming and sweepstakes law for sixteen (16) years, was engaged to analyze and draft an opinion on the legality of a sweepstakes promotion in Alabama. Similarly, Mr. Frank Miller, former head of the Washington State Gaming Commission and a national specialist in questions of gaming and sweepstakes law for over twenty-four (24) years, was engaged to perform the same services. Copies of the legal opinions are attached as Exhibits 3 and 4.

[1473] 14. The Birmingham Racing Commission engaged Gaming Laboratories International, Inc. ("GLI") to conduct an inspection and analysis of the Quincy's Sweepstakes on or about November 20, 2005. A copy of the report issued by GLI is attached as Exhibit 5.

15. The System began operation on December 15, 2005. Sheriff Mike Hale's raid of the facility on December 22, 2005, ended the operations of the sweepstakes.

How the Quincy's Sweepstakes Operates

16. Sweepstakes promotions are lawful in the State of Alabama. Sweepstakes promotions like the AmSouth sweepstakes, the McDonald's Monopoly game, the Publisher's Clearing House Sweepstakes, and phone card sweepstakes games are lawful in Alabama and do not violate Alabama's gambling statutes or constitutional prohibition against lotteries. In each case, there is a product being promoted. In each case, there is a sweepstakes entry that was distributed randomly. In each case, there is an action by which the purchaser of the promoted product will reveal the sweepstakes result. In each case, the process of revealing the result has no effect on whether the sweepstakes entry will be successful. In each case, the primary focus of the sweepstakes is to promote the goods or services of the sweepstakes promoter.

17. Customers purchase cybertime at the rate of four (4) minutes per dollar. For each dollar of cybertime purchased, customers receive 100 sweepstakes entries.

18. All sweepstakes entries, whether obtained with the purchase of cybertime, by mail, or by request at the facility, are drawn in the same manner. Entries cannot be changed or altered at any time.

19. Although a customer does not immediately know the sweepstakes results when the entries are distributed to him, the customer is provided with a number of ways to reveal the results. The customer can learn the outcomes of

his sweepstakes entries by accessing a website [1474] remotely, by using the Computer Terminals, by calling a toll-free phone number, or by revealing the outcomes on a Reader.

20. The Birmingham Race Course has over 1,300 Readers. The Readers are divided among different entertainment scenarios, and each Reader reveals a batch of entries in a quantity selected by the customer. The customer swipes his account card to activate a Reader. Once activated, the customer presses a button on the Reader to see the results of the selected number of entries.

21. The entries the customer receives after the purchase of cybertime are the same entries that are revealed. When a customer's sweepstakes entries are revealed, those sweepstakes entries are marked as revealed and they cannot be revealed again. If a customer chooses to use a Reader to reveal entries, a server selects the order in which a customer's outcomes are revealed. The total prize value of the subset is sent to the Reader so the Reader can show the outcome to the customer. For example, when a customer elects to reveal five of the customer's sweepstakes entries, a server might select five of the customer's sweepstakes entries that happen to be non-winners, in which case the appropriate communication would be relayed to the Reader, and the Reader would display that outcome to the customer. Alternatively, a server might select five of the customer's sweepstakes entries that happen to be winners and relay the appropriate communication to the Reader. The Reader will ultimately display the exact value of the customer's sweepstakes entries.

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Components of the System

22. The products and services offered at the CyberCenter and on the first floor provide for and promote personal computer usage, Internet access and voice communications via the Internet, and information on pari-mutuel wagering. The cybertime sold for use in the [1475] CyberCenter is more than simply Internet access time. The CyberCenter features Computer Terminals that provide access to a personal computer with broadband Internet connection where users can browse the Internet, access email, and learn about and use commercial software applications licensed for use on that Computer Terminal. The package offered at the CyberCenter includes the following: services such as photocopying, printing, photographic reproduction (both color and black and white); access to software programs for use in preparing tax returns, computer games, and basic computer skills tutorials (for Windows, Microsoft Office, other programs and the Internet itself); and the sale or rental of certain computer hardware, including headsets that can be used for voice communications and flash drives for data retention and transfer. Further, customers can access pari-mutuel tip sheets and information useful for handicapping live and simulcast horse and greyhound racing sites around the country. The Computer Terminals provide links to pari-mutuel racing sites including the Daily Racing Form, Global Greyhounds, Greyhound Data, Greyhound Racing Association of America, American Greyhound Track Operators Association and Rosnet Racing. Attached as Exhibit 6 are screen shots of the services provided at the CyberCenter. Also attached as Exhibit 7 are photographs of the CyberCenter and the Computer Terminals.

23. The CyberCenter offers free training to patrons of the facility on weekends or other appropriate times to educate members of the public concerning the use of computers and the Internet. Trained personnel are available to assist customers at the CyberCenter location in the full scope of computer use and related services available at the location.

24. Customers must have an account in order to purchase cybertime. With that account number, the System keeps track of how much cybertime a customer has purchased and how much that customer has used. The account is accessed through a plastic account access card [1476] containing an encoded magnetic strip similar to a credit card. Once cybertime has been purchased, it can be used at any one of the many Computer Terminals located in the CyberCenter on both floors of the Birmingham Race Course facility. The Computer Terminals have restricted access requiring use of attached card swipe readers.

25. The System comprises a number of components that, among other functions, deliver the cybertime service to the purchasing customer and keep track of the customer's sweepstakes entries. Exhibit 8 (Figure 1) shows an overview of the system components and their relationship to one another, specifically, the figure shows the database and its two main data stores, the account data, and the cybertime and sweepstakes data.

26. Central Database. The central component of the System is a database where the customer's account is tracked. The account maintains the cardholder's information, the balance of purchased cybertime remaining, the

quantity of sweepstakes entries issued, and the balance of sweepstakes winnings revealed, but not yet redeemed.

27. Point of Sale Terminals. The Point of Sale Terminals allow customers to purchase cybertime for their accounts and to redeem any revealed winning sweepstakes prizes. The Point of Sale Terminal is connected to the Universal Point of Sale server which handles all transactions and connections with the Central Database. When a customer purchases cybertime a request is forwarded from the Point of Sale to the Universal Point of Sale server where it is credited to the customer's account in the Central Database. This sale of cybertime also triggers the System to give a customer promotional sweepstakes entries by associating them with the customer's account at the time of purchase.

28. Computer Terminals. The Computer Terminals are state-of-the-art personal computers that are the primary access point for the services sold by the CyberCenter. The Computer Terminals are equipped with a suite of licensed commercial software applications (like Microsoft Office) that can be used by customers on the local computer and they allow broadband access to the Internet. The [1477] Computer Terminals have attached swipe card readers that provide customers access by swiping their account access cards. The Computer Terminals are connected to a sewer called the CyberCenter Kiosk Webservice ("Computer Terminal server") that deducts cybertime from the customer's account as the customer uses access time at the Computer Terminal.

29. The Readers. The Readers reveal sweepstakes entries. The Readers are designed to show sights and

sounds that heighten the suspense and excitement of the sweepstakes. The Readers reveal the outcomes to the customers in groups. The Readers do not determine the outcome of the sweepstakes; rather, they merely reveal the outcome to the customer in an entertaining manner. The only random process that takes place on the Reader is the determination of which entertaining display to use to show a losing outcome or a winning outcome of equal value. For example, a Reader might have several hundred different ways of showing a non-winning sweepstakes outcome to the customer.

30. Servers. The Point of Sale Terminals, Computer Terminals, and Readers are connected to three separate servers. The Universal Point of Sale server runs from the CyberCenter back office and handles requests from both the Point of Sale and Recharge Kiosks. The Universal Point of Sale server credits the customer's account in the database with cybertime when purchases are made at either the Point of Sale or the Recharge Kiosks and gives the customers sweepstakes entries. The Computer Terminal server also runs from the CyberCenter back office and controls access to the Computer Terminals. When a customer swipes an account access card at a Computer Terminal, the Computer Terminal server determines whether the [1478] customer has cybertime available. If so, the Computer Terminal server allows the customer access to the Computer Terminal. The Computer Terminal server keeps a record of the cybertime available on the customer's account. The Reader server determines which of the customer's sweepstakes entries will be revealed on any given request. For example, if a customer makes a request at a Reader to reveal five sweepstakes entries and

the customer has 100 available, the Reader server determines which five entries to reveal. The Reader server then sends the information on the five entries to the Reader and marks those five entries as revealed in the database.

31. Customer Tracking Terminal ("CTT"). The CTT provides a mechanism for entering the customer's account data into the System and issuing a customer account card. Customers new to the CyberCenter must sign up and get an account card to begin tracking cybertime. The CTT interfaces with the Customer Tracking System.

32. Customer Tracking System ("CTS"). The CTS provides an interface between the central database and the CTT. In addition to facilitating account creation and data entry, the CTS can be leveraged to facilitate promotions.

33. Recharge Kiosk. The recharge kiosks are automated stations that allow existing customers with account access cards to purchase additional cybertime and add it to their accounts. If customers have won cash prizes in the sweepstakes, they can use the Recharge Kiosks to use those winnings towards additional cybertime purchases. The Recharge Kiosks are connected to the Universal Point of Sale server.

34. Management Terminal. The management terminals allow users to monitor and control the system. They provide access to reports on how the System works and on the current state of the System. Management Terminals are personal computers running proprietary [1479] software that provides them with a means of requesting and displaying information from the Central Database. Customers who call in to determine the outcome of their

sweepstakes entries will be serviced by employees of the CyberCenter through the Management Terminals. Management Terminals provide access to information from the database through their connection to the Management Terminal Service.

35. Management Terminal Service ("MTS"). The MTS connects the Management Terminals to the Central Database. The MTS packages requests for information from the Management Terminals and returns the data requested from the database. The MTS runs on a server in the back office of the CyberCenter.

36. Security Firewall. An integral part of the services of the CyberCenter is providing customers with access to the Internet. The security firewall is one component of the security system that protects the CyberCenter from attacks from the Internet while still allowing the customers access to the services they are paying for. The security firewall also allows access to a webservice that can provide sweepstakes customers with information on their sweepstakes entries from their home computers via the Internet.

Impact on Operations at the Birmingham Race Course

37. For the period December 15, 2005 through December 21, 2005, the pari-mutuel handle (live and simulcast) at the Birmingham Race Course was up 12.2% as compared to the same period for 2004. As compared to the month before (November 2005), the pari-mutuel handle for the same period was up 29.3%.

38. For the period December 15, 2005 through December 21, 2005, attendance at the Birmingham Race Course was up 256.5% as compared to the same period for 2004. As compared to the month before (November 2005), attendance for the same period was up 363.6%.

[1480] 39. For the period December 15, 2005 through December 21, 2005, food and beverage sales at the Birmingham Race Course was up 65.9% as compared to the same period for 2004. As compared to the month before (November 2005), the food and beverage sales for the same period was up 124.5%.

LEGALITY OF THE QUINCY'S SWEEPSTAKES

Meetings with State and Local Law Enforcement

40. Prior to opening the CyberCenter and commencing the sweepstakes promotion at the Birmingham Race Course, legal counsel for the Plaintiffs reviewed Alabama law on sweepstakes including, without limitation, Attorney General opinions 94-249, 99-0028 and 2005-173, the Alabama sweepstakes statute Ala. Code § 8-19D-1 and Supreme Court decision in *Pepsi Cola Bottling Company of Luverne, Inc. v. Coca-Cola Bottling Company,* 534 So. 2d 295 (Ala. 1988).

41. On or about May 25, 2005, the Plaintiffs demonstrated the Quincy's Sweepstakes operation to be conducted at the Birmingham Race Course for the Attorney General's office. The demonstration system was presented to a representative of the Alabama Attorney General. The demonstration included a description of the Quincy's Sweepstakes and its components, and the CyberCenter and its planned services. Thereafter, after receiving all

additional documentation requested, the Attorney General's office advised that sweepstakes promotions were legal in Alabama, that to their knowledge nothing in Alabama law prohibited the operation of such a sweepstakes, and that if the sweepstakes operated as demonstrated that it would be lawful under Alabama law. The Attorney General's office further advised that if they were approached by other law enforcement agencies that they would render the same opinion.

[1481] 42. On or about August 24, 2005, counsel for the Plaintiffs met with Sheriff Mike Hale, his attorney and several deputy sheriffs. Counsel for the Plaintiffs addressed the applicability of Attorney General opinions 99-0028 and 2005-173, the sweepstakes statute and the *Pepsi Cola* case decided by the Alabama Supreme Court, explained the nature of the activities the Plaintiffs planned to conduct at the Birmingham Race Course and the type of equipment that would be involved. They answered all questions from the Sheriff, his deputies and counsel. Finally, counsel for the Plaintiffs invited the Sheriff or his representatives to a demonstration of the sweepstakes promotion that was scheduled two days later for the Birmingham Racing Commission.

43. The Plaintiffs through counsel also spoke with the District Attorney for Jefferson County and invited him or his representative to attend the demonstration at the Racing Commission. The District Attorney first agreed to attend, but later declined and advised that he would not be present for any demonstration. Counsel for the Plaintiffs then had several conversations with a representative of the District Attorney's office explaining the nature of the Quincy's Sweepstakes.

44. On August 26, 2005, the Plaintiffs and counsel met with the Racing Commission and demonstrated the Quincy's Sweepstakes. The meeting was attended by the members of the Racing Commission, members of the press, the Birmingham Police Department, and at least one representative of the Defendant. The Plaintiffs answered numerous questions presented by the press, the Birmingham Police Chief, and Lieutenant Dennis Blanton of the Vice and Narcotics Division of the Sheriff's Department. Following the question and answer period, the Racing Commission enacted a resolution approving the sweepstakes promotion. A copy of the resolution is attached as Exhibit 9. Regulations for the operation of the Quincy's Sweepstakes [1482] have likewise been adopted by the Birmingham Racing Commission, a copy of which is attached as Exhibit 10.

45. On or about December 8, 2005, representatives of the Sheriff's Department, counsel for the Sheriff, the District Attorney, Dan Ireland, Eric Johnston and others met with the Attorney General's office in Montgomery. In that meeting, the Attorney General advised that sweepstakes were lawful in Alabama, that the activities demonstrated to his office and planned for The Birmingham Race Course were a lawful sweepstakes and that any change in Alabama law should be taken to the Legislature. Attorney General Troy King further stated that the Quincy's MegaSweeps might be in violation of the Alabama law regarding gambling if it appeared that the sale of internet time in connection with the sweepstakes promotion was a sham.

46. On December 12, 2005, counsel for Innovative directed a letter to Messrs. Waldrep and Barber again offering a further demonstration and explanation of the

sweepstakes promotion and to furnish any supporting information that might be requested by their offices to assist their evaluation of the system. A copy of this letter is attached as Exhibit 11.

47. On or about December 15, 2005, the Plaintiff Birmingham Race Course officially opened its CyberCenter and sweepstakes promotion at the Birmingham Race Course.

Prior Testimony on Legality by Law Enforcement

48. On or about October 12, 2005, Roger Brown, formerly Chief Deputy District Attorney with the Jefferson County District Attorney's Office, testified in the District Court of Jefferson County. Mr. Brown testified that District Attorney Barber had written a letter requesting an Attorney General's opinion in response to a prior inquiry from Lieutenant Dennis Blanton with the Jefferson County Sheriff's Department regarding the legality of sweepstakes machines. Mr. Brown further testified that he subsequently had a conversation with John Gibbs [1483] with the Attorney General's office who advised no additional opinion would be issued, that two opinions had been written previously on the subject, and that the *Pepsi Cola* case had been decided by the Alabama Supreme Court. As a result Mr. Brown authored a letter to the Defendant and all Chiefs of Police in Jefferson County advising them that it was the Attorneys General's opinions that sweepstakes machines were not violative of Alabama's gambling statutes. (Page 29.) A copy of this testimony is attached as Exhibit 12. A copy of Mr. Brown's letter to the Sheriff is attached as Exhibit 13. In this case involving the testimony of Mr. Brown, Judge Cahill convicted the defendants, and

the decision now is on appeal to the Jefferson County Circuit Court.

49. On or about October 12, 2005, Lieutenant Dennis Blanton, a 34 year veteran with the Vice and Narcotics Division of the Jefferson County Sheriff's Department, testified that he was familiar with sweepstakes machines operated at the Spin & Win facility in Warrior, Alabama. He testified that he had a question about the legality of these machines and spoke with Roger Brown and Diana Presley with the Jefferson County District Attorney's Office. Lt. Blanton testified that the District Attorney's Office advised him that the machines were legal according to the Attorney General's opinion and a Supreme Court ruling. (Page 337.) A copy of this testimony is attached as Exhibit 14. In this case involving the testimony of Lt. Blanton, Judge Cahill convicted the defendants, and the decision now is on appeal to the Jefferson County Circuit Court.

50. On or about September 2, 2004, Lieutenant Blanton also prepared an incident report regarding his inspection on certain sweepstakes machines owned by Richard Graham and operated in Jefferson County. In that document, Lt. Blanton reports advice he received from [1484] Assistant District Attorney Diana Presley that such machines were legal according to the Attorney General's opinion. A copy of this report is attached as Exhibit 15.

51. On December 29, 2005, Sgt. Rod Robertson, Jefferson County Sheriffs Office, Narcotics Division, attempted to serve a Jefferson County District Attorney subpoena on Multimedia in Austin, Texas.

52. The Defendant has attempted to subpoena Attorney General Troy King to testify in this case. On January 13, 2006, Attorney General King stated through a spokesperson that "he (King) is unfamiliar with McGregor's operations, so it would be inappropriate for him to testify as an expert." A copy of the article reporting the statement is attached as Exhibit 20.

53. On or about December 16, 2005, the Attorney General's office issued a statement that if the Birmingham Race Course's business was "operating as they said they will operate, then they're operating a sweepstakes and sweepstakes are legal." A copy of the article reporting the statement is attached as Exhibit 16.

54. On or about January 1, 2006, the Attorney General's office issued a statement that the Plaintiffs' sweepstakes promotion at the Birmingham Race Course was legal, and that based on the information available to that office, the Plaintiffs were not breaking the law. The Attorney General's spokesman also stated that "we have laws that are very, very broad and vague and are hard to enforce. The solution is in the Legislature." A copy of the article reporting the statement is attached as Exhibit 17.

SEIZURE OF SYSTEM COMPONENTS AT BIRMINGHAM RACE COURSE

55. On or about December 21, 2005, a representative of the Jefferson County Sheriff's Department applied for a search warrant that was issued by District Judge Robert Cahill [1485] at 5:00 p.m. on December 21, 2005. A copy of the search warrant and affidavit are attached as Exhibit 18.

56. The search warrant was executed on or about 7:00 a.m. on December 22, 2005, and continued until it was enjoined effective 5:30 p.m. the same day by the Circuit Court of Jefferson County. An inventory of the property seized is attached as Exhibit 19. The seized property was physically transported by a moving company named Two Men and a Truck. Some of the sweepstakes equipment (including servers, readers and computers) was damaged during the course of removal. The Plaintiff's best estimate of time for repair and start up of the facility is twenty-one (21) days.

57. On January 5, 2006, the Sheriff's Department returned the equipment that had been seized from the Race Course.

58. On the day of the seizure, December 22, 2005, the pari-mutuel handle (both live and simulcast) was down 62% as compared to the handle for first day of the sweepstakes promotion, December 15, 2005. Similarly, comparing the pari-mutuel handle for day of the seizure with the same day for the year before, the pari-mutuel handle was down 59%.

59. On the day of the seizure, December 22, 2005, attendance was down 94.3% as compared to the attendance for first day of the sweepstakes promotion, December 15, 2005. Similarly, comparing the attendance for the day of the seizure with the same day for the year before, attendance was down 70.5%.

60. On the day of the seizure, December 22, 2005, the food and beverage sales at the Race Course were down 80.7% as compared to the handle for first day of the sweepstakes promotion, December 15, 2005.

APPENDIX K – TRANSCRIPTION OF ALABAMA SUPREME COURT CHIEF JUSTICE DRAYTON NABERS' 2006 TELEVISION CAMPAIGN COMMERCIAL[1]

NARRATOR: On gambling, the difference is clear. As Finance Director, Drayton Nabers fought against the gambling bosses. And Sue Bell Cobb?

WAKA-TV, 10/16/06 REPORTER: Did you really take any money from the gambling bosses, and if so why?

SUE BELL COBB: Uhm, I am not sure what they're talking about there to be perfectly frank.

NARRATOR: Here's what we're talking about: Thousands from the casino bosses.

[Image displayed showing the following:

Cobb Gambling Contributors

- Greene Track Dog Track (Please PAC)
- Poarch Creek Indians PAC (Please PAC)
- PCI Gaming (Please PAC)
- Milton McGregor (Victory Land Dog Track)
- Jemison & Mendolson

Source: FCPA Reports Filed 9/06 with AL Sec. of State]

SUE BELL COBB: "I am totally . . . uh . . . just mesmerized about that."

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[1] Accessed on October 25, 2006 at http://www.draytonnabers.com/media.asp. Because this website is no longer active, Petitioner will supply the Court with a CD containing a media file of this commercial if such would assist the Court in its determination.

NARRATOR: So are we. Sue Bell Cobb, too liberal for Alabama.

[Image displayed showing the following:

SUE BELL COBB
TOO LIBERAL FOR ALABAMA
See for yourself:
gamblingwithcobb.com
PAID FOR BY CHIEF JUSTICE NABERS
FOR SUPREME COURT, P.O. BOX 550310,
BIRMINGHAM, ALABAMA 35213]

APPENDIX L – NEWSPAPER ARTICLES

Jim Galloway, *Alabama Group Says It and Reed Have Clean Hands*, Atlanta Journal Constitution, July 2, 2005, at A1.

The Christian Coalition of Alabama on Friday exonerated itself and Republican political strategist Ralph Reed of bringing gambling money into a series of fights against video poker legislation.

The group declared itself innocent of knowing that more than $2 million used to fight video poker legislation – and $300,000 more that went into a campaign to defeat a state lottery – originated with the Mississippi Band of Choctaws, an Indian tribe out to protect its casino interests in the neighboring state.

The Christian Coalition chapter also accepted Reed's contention that the money came from the tribe's non-gambling revenues – and so declared that Reed's efforts to filter much of the Choctaw cash through a third party, Americans for Tax Reform, were irrelevant.

"The Christian Coalition of Alabama did not violate in any way its policy against accepting funds either directly or indirectly from gambling interests," the group's report concluded.

In a letter posted on its Web site, Reed apologized for not telling the Christian Coalition the source of the money.

"On reflection, and in abundance of caution, I should have further explained that the contributions came from the Choctaws. This has caused difficulty for the Alabama Christian Coalition . . . which I deeply regret," said Reed, a Republican candidate for lieutenant governor of Georgia.

In a reply to Reed, Bob Russell, chairman of the group, wrote, "For our part, this settles the matter, and we're moving on." He also told reporters the group would no longer accept money from the Choctaws.

Complied with policy

John Giles, president of the Christian Coalition of Alabama and one of the most powerful religious conservatives in the state, had declared to Alabama lawmakers, under oath, that the anti-gambling campaigns in 1999 and 2000 had not been funded by Mississippi gaming interests.

Giles called for the self-investigation in May after a U.S. Senate investigation and news reports revealed the source of the money and details of Reed's dealings with Jack Abramoff, a now-disgraced Washington lobbyist who represented six Indian tribes, including the Choctaw, that draw much of their wealth from casino gambling. Abramoff and an associate are accused of defrauding the tribes of millions of dollars in lobbying fees.

Efforts by the Journal-Constitution to contact Giles on Friday were unsuccessful. But in a telephone conference with Alabama reporters, he said the Christian Coalition had no plans to return the money to the Indian tribe.

"The fact is that our board's policy was honored. This was non-gambling money, so it complies with our board policy," Giles told The Associated Press.

Skeptical reaction

The Choctaw tribe derives 85 percent to 90 percent of its revenue from casinos and related entertainment businesses.

Appendix L

Reaction Friday to the Christian Coalition giving itself and Reed a clean bill of ethical health was sharp, and skeptical, in some quarters.

"I'm insulted," said the Rev. Thomas Grey, executive director of the National Coalition Against Legalized Gambling in Washington, which worked with the Christian Coalition on the Alabama campaigns. "It seems to me that credibility is all that groups have when they stand on the values battlefield. [Giles and Reed] have lost the high ground. They can wallow in the swamp together for all I care," Grey said.

Other evangelicals brought into anti-gambling campaigns by Reed, including James Dobson, chairman of the influential Focus on the Family, have said they would not have participated had they known the efforts were funded by the Alabama State Rep. Randy Hinshaw of Huntsville, a Democrat, has put forth legislation that would force the Christian Coalition to disclose its sources of funding. "If the Choctaw are not a gambling interest, then there is no gambling interest – anytime or anywhere," he said.

Brad Alexander, a spokesman for Casey Cagle, who is running against Reed in next year's Republican primary, said: "It's sad to see good conservatives having their reputations tarnished from associating with Ralph Reed. This is a clear case of a lobbyist abusing the trust of good people who entered the process with the best intentions, solely in order to enrich himself."

Appendix L

Anti-gambling strategies

In a statement he issued Friday, Reed said efforts to tie him to the troubles of Abramoff, a longtime friend, are off-base. "Criticism is part of the rough and tumble of public life. But to associate me or the Christian Coalition of Alabama with alleged misdeeds by the [Abramoff] law firm or its employees is an attempt at guilt by association, and is unfair and wrong," he said.

The Christian Coalition investigation was conducted by an Indiana attorney retained by the group and based on information gleaned from news reports and a hearing last week in Washington by the Senate Indian Affairs Committee, chaired by Republican Sen. John McCain of Arizona.

Even as the Christian Coalition's report concluded there was no wrongdoing, it also shed new light on the Alabama anti-gambling campaigns.

In 1999, the Alabama Legislature was considering two related bills – one to establish a statewide lottery, the other to permit video poker at the state's dog-race tracks. Giles said Reed approached him "and asked to help with the anti-gambling efforts," the report said. Reed was placed in charge of strategy and fund-raising.

Reed didn't tell Giles that he was also working, at the same time, for Abramoff and his law firm – whose Indian tribe clients were funding campaigns against gambling enterprises that competed with their operations. Unknown to Giles, Reed was passing his strategy and working budgets to Abramoff and the Choctaws for approval.

Appendix L

Christian Coalition report

By May 1999, the Choctaw had paid Reed about $1.3 million for his efforts. The lottery measure passed, but the video poker bill was defeated.

The Christian Coalition investigation did not address $300,000 that went in October 1999 to Citizens Against Legalized Lottery, an independent group, to urge voters to defeat the state referendum. That money, also arranged by Reed, originated with the Choctaw but was passed through Americans for Tax Reform, a Washington anti-tax group run by Grover Norquist, a close associate of both Reed and Abramoff.

In early 2000, the Choctaw sent $850,000 to the Christian Coalition, in the form of three separate checks, again filtered through Americans for Tax Reform. "When Mr. Giles received these checks, he asked Mr. Reed and Century Strategies to confirm that the money was not derived from gambling sources. Mr. Reed assured him that it was not," the Christian Coalition report said. All of the checks received by the Christian Coalition were immediately signed over to Reed's firm, Giles has said.

The report also noted that a spokeswoman for the Choctaw said, in last week's Washington hearings, that the Choctaw money was from its non-gambling related enterprises.

"Passing gambling money through a conduit . . . would still violate the Christian Coalition of Alabama's policy, if gambling money was the original source of the funds," the Christian Coalition report said. "In this instance, gambling money was not the original source of the contribution."

Appendix L

Drew Jubera, *There's Nothing Civil about Ala. Judicial Race, Chief Justice Campaign Turns 'Mean-Spirited'*, Atlanta Journal Constitution, June 5, 2006, at A1.

Birmingham – It's been called a "bare-knuckle fight," "a political mud bog" and "a mess." If it were a race for county coroner, it might also be called colorful.

But it is Tuesday's Republican primary for chief justice of the Alabama Supreme Court, and many observers say the candidates have pushed the boundaries of judicial electioneering farther than ever before. Some wonder if it will now spread to judicial races across the country.

Ads for incumbent Chief Justice Drayton Nabers declare he's a conservative who is "pro-life" and against same-sex marriage.

Ads for his opponent, Supreme Court Justice Tom Parker, counter that Nabers is a "Jimmy Carter-style liberal" who believes state courts are beholden to rulings of the U.S. Supreme Court, including Roe v. Wade. Parker says state courts should ignore U.S. Supreme Court precedent in such cases, and so concludes: Nabers "backs legal abortion up to the day of delivery."

Nabers' campaign organized a news conference for another judge to attack Parker. That judge: a fellow Alabama Supreme Court justice.

"They've exceeded the nausea level," said Mark White, a Birmingham lawyer and co-chair of the National Ad Hoc Advisory Committee on Judicial Campaign Conduct. "It's mean-spirited, it's unfortunate, and having spent a large part of my life trying to improve the quality of rhetoric in judicial campaigns, I am deeply saddened."

Appendix L

Judicial races here have had their unseemly moments – a 1996 ad by a Supreme Court justice alluded to his opponent with pictures of a skunk. But many observers believe the line between mud-slinging legislative campaigns and the normally more decorous races for high court has been all but erased.

The Supreme Court primaries, which include contests for three other seats, have been virtual shadow campaigns of the Republican primary for governor, which pits incumbent Bob Riley against former Alabama Chief Justice Roy Moore, known widely as the Ten Commandments judge.

But the conduct of the judicial races has moved to the forefront as Riley, once considered vulnerable because of his tax proposal several years ago to improve public schools (voters defeated it in a referendum), has soared way ahead in polls.

But a recent poll had Parker and Nabers in nearly a statistical dead heat, but with 55 percent of voters undecided.

Riley appointed Nabers, his administration's finance director, as chief justice two years ago when Moore was booted from the bench by an ethics panel, having refused a federal court order to remove the two-ton Ten Commandments monument he had rolled into the rotunda of the state judicial building in Montgomery.

Parker is a former Moore aide. He won his seat on the Supreme Court in the wake of Moore's dismissal, which galvanized Alabama's religious right.

Parker inflamed passions again in January when he wrote an op-ed piece in The Birmingham News criticizing his

court colleagues for commuting a death sentence for a teen murderer to life in prison. The ruling was based on a U.S. Supreme Court decision that bans the execution of those who kill when they are minors. Parker, who recused himself from the case, wrote, "State Supreme Court judges should not follow obviously wrong decisions simply because they are precedent."

The result this election cycle has been what's dubbed the "Moore slate" of candidates for the all-Republican Supreme Court. Like Moore, these candidates – four challengers to incumbents – say God is the sovereign source of U.S. laws and government, and that state courts are not bound by any "rule of law" that violates that sovereignty.

When one "Moore" candidate, Henry Fowler, said during his campaign that incumbent justice Thomas Woodall was a liberal disguised as a Republican, Woodall responded in The Decatur (Ala.) Daily newspaper that his opponent was "one of Tom Parker's flunkies," ridiculed Parker's work on the court ("He doesn't handle his cases; he just lets them pile up") and called the idea of ignoring U.S. Supreme Court precedent "all gibberish."

John Carroll, law school dean at Samford University in Birmingham, said the race has tapped into what he called "the classic tension between the populist view of judges and an independent judiciary's view."

Carroll added: "The view in these commercials is, 'This is a popular election and we're going to slug it out and get elected on personal values,' as opposed to, 'We're going to be fair and impartial and follow the law.'"

Jesse Rutledge of the Washington-based Justice at Stake, which monitors judicial elections nationwide, said, "I've never heard of a Supreme Court campaign debate come down to whether or not the law of the land should be followed. It's shocking."

Much of the credit – or blame – should go to a 2002 U.S. Supreme Court ruling that struck down many limits on what judicial candidates can say during campaigns. Known as the "White decision," it chucked restrictions that were imposed in Minnesota, which barred judicial candidates from declaring their views on disputed legal or political issues.

That loosening of speech was embraced in Alabama, where more money has been spent on Supreme Court races since 1993 than any other state in the country. Hot-button social issues like abortion, gay marriage and even taxes have become the judicial campaigns' centerpieces.

"We may be looking at the first real post-White campaigning," said Roy Schotland, Georgetown University law professor and judicial selection expert. "You don't have to think about whether you're electing a judge or a state senator. It's disastrous."

Other academics and legal groups also bemoan the new free-wheeling environment. They say it undermines judges' integrity with the public, intensifies the influence of special interest groups and increases the chances of a jurist having to recuse himself in cases where he has been outspoken on an issue.

But candidates in the Alabama races welcome the opportunity to be open about their views on social and religious

issues – they say voters here demand it – even as they express outrage at what they say is their opponents' dishonesty.

"Issues relating to the right to life and the sanctity of marriage are in the soul of Alabamians, and they want a judge who shares their conservative views," Nabers said Friday, before a weekend of campaigning. "I don't have the slightest issue with it relating to the public trust. It's just being honest about who I am."

Nabers added that if a litigant thinks a declared position a justice has taken during the campaign hurts his case, he can file a motion for recusal. But Nabers said that during his two years on the court, not a single case involving abortion, for instance, has come up.

"It just so happens in Alabama people think a biblical foundation relates to impartiality and fairness," he said, "and they're right."

Yet there are concerns.

"The risk is of the judiciary becoming less independent," said John Pickens, executive director of the Alabama Appleseed Center for Law and Justice, a Montgomery group that has advocated appointing judges or nonpartisan elections. "They're less likely to be open to considering each case on the facts without some preconceived view on the issue."

The future effects of the judicial campaigns, here and elsewhere, remain to be seen.

"We're going to learn a lot [on Tuesday] about how effective this campaigning is," said White, who in 1998 chaired

the state's first judicial elections oversight committee. "I'll be intrigued to see whether the public thinks it's a great idea, or whether they find if a little disgusting. But I don't see it changing anytime soon."

OTHERS ON BALLOT

Governor

• Incumbent Bob Riley faces former Alabama Chief Justice Roy Moore in the Republican primary. Riley refused to back Moore in 2003, when Moore declined to obey a federal court order to remove a Ten Commandments monument from the Supreme Court building's rotunda and was himself removed from office by a state judicial ethics panel.

• On the Democratic side, Lt. Gov. Lucy Baxley, ex-wife of former lieutenant governor and state Attorney General Bill Baxley, faces candidates who include former Gov. Don Siegelman, who is on trial on racketeering charges, accused of swapping political favors for gifts and campaign donations. He has denied the charges and remained almost even with Baxley in recent polls.

Lieutenant governor

• George C. Wallace Jr., son of the segregation-era Alabama governor, is running in a field of four Republicans to be the nominee to oppose Democrat Jim Folsom Jr. – a former lieutenant governor and the son of "Big Jim" Folsom, whom Wallace's father defeated to become governor. Just to add to the tangle, the younger Folsom is cousin to yet another late governor: the senior Wallace's wife (and Wallace Jr.'s mother), Lurleen Wallace.

Supreme Court, U.S.
FILED
MAR 14 2007
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No. 06-1363

IN THE

Supreme Court of the United States

JEFFERSON COUNTY RACING ASSOCIATION, INC.,
dba THE BIRMINGHAM RACE COURSE,

Petitioner,

v.

DAVID BARBER, in His Capacity as District Attorney
of Jefferson County, Alabama,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF FOR GEORGIA COMMITTEE FOR ETHICAL JUDICIAL CAMPAIGNS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Georgia Committee for Ethical Judicial Campaigns is a committee of concerned citizens formed in 2004 in an effort to keep Georgia's judicial elections and courts fair and impartial and to protect the rights of people who come before them.[1] The committee was formed in answer to the call in Justice Kennedy's pivotal concurrence to *Republican Party of Minnesota v White*:

> The legal profession, the legal academy, the press, voluntary groups, political and civic leaders, and all interested citizens can use their own First Amendment freedoms to protest statements inconsistent with standards of judicial neutrality and judicial excellence. Indeed, if democracy is to fulfill its promise, they must do so. They must reach voters who are uninterested or uninformed or blinded by partisanship, and they must urge upon the voters a higher and better understanding of the judicial function and a stronger commitment to preserving its finest traditions. Free elections and free speech are a powerful combination: Together they may advance our understanding of the rule of law and further a commitment to its precepts.

Republican Party of Minnesota v. White, 536 U.S. 765, 795, 122 S. Ct. 2528, 2545 (2002).

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1. Pursuant to Rule 37.6 this amicus certifies that no counsel for any party authored this brief in whole or in part. No persons or entities other than this amicus, its counsel, or its members made a monetary contribution to the preparation and submission of this brief. Letters reflecting the parties' consent to the filing of this brief have been filed with the Clerk.

The formation of a committee independent of the State Bar of Georgia and the Georgia Judicial Qualifications Commission was necessary, because the Eleventh Circuit Court of Appeals has found warrant in the Constitution to protect judicial candidates from "damaging public statement[s] which ha[ve] the imprimatur of the government." *Weaver v. Bonner*, 309 F.3d 1312, 1324 (11th Cir. 2002). The State Bar and the Judicial Qualifications Commission are administrative arms of the Supreme Court of Georgia. O.C.G.A. § 15-19-30; Ga. Const. Article VI, § VII, ¶ VII.

SUMMARY OF ARGUMENT

Relying on newspaper accounts and a pleading filed with a state regulatory body, this brief undertakes to describe the consequences, as they have played out in Georgia, of *Republican Party of Minnesota v. White* and its progeny. In particular, this brief focuses on the contested 2006 race for a seat on the Supreme Court of Georgia. The events detailed in this brief suggest that this Court underestimated the effect of *White* upon the integrity of the judiciary and the rule of law.

Those events also suggest that the tripartite analysis of the concept of impartiality in *White* should be reexamined. That analysis did not anticipate an interest group attempting to buy a seat on a state supreme court. The actions of an interest group in the 2006 Georgia Supreme Court election have been so characterized. That interest group evaluated the justices on the basis of their production of decisions that advanced the group's goal of "restraining the spread of liability." Those evaluations gave no consideration whatsoever for the merits of legal issues.

The holding of *White* is, in effect, that candidates for judicial office have a constitutional right to run campaigns that demonstrate their unfitness for judicial office. The remedy petitioner advocates – recognition of a robust Due Process right to recusal of judges who attained their offices by demonstrating partiality – is an appropriate way to balance litigants' Due Process rights with judicial candidates' First Amendment rights.

ARGUMENT

I. Events in Georgia

A. Legal background

In 2002 this Court held that a "canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment." *Republican Party of Minnesota v. White*, 536 U.S. 765, 788, 122 S. Ct. 2528, 2542 (2002). But this Court "neither assert[ed] nor impl[ied] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." 536 U.S. 783, 122 S. Ct. 2539.

Later that same year the United States Court of Appeals for the Eleventh Circuit, which encompasses both Georgia and Alabama, went further. It held, "We agree that the distinction between judicial elections and other types of elections has been greatly exaggerated, and we do not believe that the distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns." *Weaver v. Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002). The *Weaver* Court went on to discover – in the penumbra of judicial candidates' free speech right –

a right to protection from rebuttal in the form of "a damaging public statement which has the imprimatur of the government." *Weaver v. Bonner*, 309 F.3d 1312, 1324 (11th Cir. 2002).

B. Political background

Weaver v. Bonner arose out of a 1998 election in which George Weaver, an attorney in private practice, unsuccessfully challenged Georgia Supreme Court Justice Leah Ward Sears. "[H]is ads claimed Sears backed gay marriage. . . . In 2004, G. Grant Brantley backed by [Georgia's Republican Governor Sonny] Perdue, challenged Sears: Sears won in a race in which she raised $396,000 and benefited from a $150,000 ad campaign from the state Democratic Party." Andy Peters and Alyson M. Palmer, *Business lobby takes aim at three justices of high court*, Daily Rep. (Atlanta), June 20, 2006, at 4.

In 2005 the Georgia General Assembly passed a sweeping tort reform package. *See* Charles R. Adams III, Georgia Law of Torts § 1-3.1 (2007 ed.). In 2006, recognizing that portions of that bill would be subject to constitutional challenge, certain business interest groups turned their attention to the Georgia Supreme Court. "The president and CEO of the Georgia Chamber of Commerce, George Israel, . . . said that the importance of protecting the 2005 changes to Georgia tort law means the Chamber can't afford to stay out of the races." Andy Peters and Alyson M. Palmer, *Business lobby takes aim at three justices of high court*, Daily Rep. (Atlanta), June 20, 2006, at 1.

"[A] collection of interest groups . . . formed an independent committee, a little used format in Georgia that allows for unlimited fundraising and spending as long as certain conditions are met." *Id.* at 4. The group is called "the

Safety and Prosperity Coalition." *Id.* According a newspaper account, the goals of the coalition, "appear[ed] to be identical to the Georgia Chamber's goals." *Id.*

In a letter to a Chamber task force "declaring why the Chamber should get involved in judicial races, Chamber president and CEO Israel included the executive summary of a 2003 'Economic Judicial Report' prepared by the Judicial Evaluation Institute in Washington D.C. and Sequoyah Information Systems in Oklahoma. The JEI is partly funded by the U.S. Chamber of Commerce's Institute for Legal Reform, according to a U.S. Chamber spokesperson." *Id.* at 5.

Acknowledging that the JEI has " 'a point of view,' . . . [t]he 2003 report looked at all seven justices sitting on the Georgia Supreme Court at that time (the same membership today, except that [Justice Harold] Melton has replaced [former Chief Justice Norman] Fletcher)." *Id.* at 4. It considered decisions in certain kinds of civil cases over several years and gave each justice a percentage rating. *Id.* The higher the percentage, " 'the better record the judge has for restraining the spread of liability,' in the estimation of the evaluators." *Id.* Justice Hunstein's score was the lowest, 42%. *Id.* The other justices scored 44%, 47%, 52%, 55%, 56%, and 66%. *Id.*[2] The report was entirely result oriented: it reflected complete indifference to the particulars of the cases or the merits of the arguments. *Id.*

There is evidence that the Chamber and the Safety and Prosperity Coalition recruited J. Michael Wiggins to run against a member of the Supreme Court. Complaint to State Ethics Commission, State of Georgia, *In the Matter of Mike*

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2. The highest score, 66%, was assigned to former Chief Justice Fletcher. Justice Fletcher, who has retired from the Court and returned to private practice, is presently an honorary chair of this amicus.

Wiggins for Georgia Supreme Court, Gary B. Andrews, Complainant, Mike Wiggins *et al.*, Respondents, filed Oct. 18, 2006, pp. 3-6. Mr. Wiggins elected to challenge Presiding Justice Carol Hunstein after considering the possibility of challenging one of the other incumbent justices up for reelection in 2006. *Id.* at pp. 2, 7; Andy Peters and Alyson M. Palmer, *Business lobby takes aim at three justices of high court*, Daily Rep. (Atlanta), June 20, 2006, at 1.

C. Candidates and their qualifications

Mr. Wiggins is accomplished. In order to run, he left the number-two legal position at the Department of Homeland Security. Alyson M. Palmer, *Tough race, tougher tactics, How Presiding Justice Carol Hunstein and her campaign advisors adopted what they feared most – the knockout ad*, Daily Rep. (Atlanta), Dec. 20, 2006, at 8. He had clerked for the U.S. Court of Appeals for the Eleventh Circuit. Jill Young Miller and Jeremy Redmon, *Foes in judicial contest go dirty, Caustic attacks fly in debate, TV ads*, Atlanta J. Const., Oct. 31, 2006, at A-4.

But he had little experience directly related to the office he sought. Mr. Wiggins "ha[d] not argued a case before the State Court of Appeals or Supreme Court in his career." Editorial, *Count on Hunstein, State Supreme Court justice's record is solid; voters must see through coalition's move to control seats*, Atlanta J. Const., Oct. 24, 2006, p. A-14. He graduated from the University of Georgia School of Law in 1993, a year after Justice Hunstein was elevated to the Georgia Supreme Court. Jill Young Miller and Jeremy Redmon, *Foes in judicial contest go dirty, Caustic attacks fly in debate, TV ads*, Atlanta J. Const., Oct. 31, 2006, at A-4.

Justice Hunstein was elected to superior court in 1984 and elevated to the Supreme Court in 1992. *Id.* Her "personal story" is, in the words of an editorial writer, "compelling." Editorial, *Reinforce court's integrity by voting for Hunstein*, Marietta Daily J., Oct. 16, 2006. "As a young woman she lost a leg to cancer, and as a young mother was deserted by her husband, but worked her way through college and then law school at Stetson University." *Id.*

D. Contributions

The Hunstein campaign raised $1,066,762. The Wiggins campaign itself raised $276,066. The Safety and Prosperity Coalition raised an additional $1,679,500. So the funds available to support the Wiggins campaign totaled $1,955,556. Andy Peters and Alyson Palmer, *Hunstein win won't end challenges, some say*, Daily Rep. (Atlanta), Nov. 9, 2006, pp. 1, 8.

Funds raised by the Safety and Prosperity Coalition included $50,000 from State Farm Insurance, $100,000 from the Georgia Medical Association, and $50,000 from DaimlerChrysler. Jay Bookman Editorial, *Outsiders invest $1.3 million in Ga. judiciary*, Atlanta J. Const., Nov. 2, 2006 at A-19.

E. Advertisements

According to a political scientist who analyzed the decisions of the Georgia Supreme Court several years earlier, Justice "Hunstein is a law and order conservative with respect to the criminal justice system." Brian Harrell Harbour, The Harbour Report: Politics, Personalities, and Persuasion on the Current Georgia Supreme Court (1998) at 77. Nevertheless, the Hunstein campaign's primary concern going into the race was that she would be attacked as soft on

crime. Those concerns were detailed in a newspaper article published after the election.

> Kenneth S. Canfield, a key campaign adviser who helped Carol W. Hunstein keep her seat on the Supreme Court of Georgia this year, recalled a moment that crystallized what most worried Hunstein and her supporters in her campaign for a third full term.
>
> Canfield was sitting in his law office at Doffermyre Shields Canfield Knowles & Devine watching a television advertisement that had been prepared for the campaign of Brent D. Benjamin, who in 2004 unseated Justice Warren R. McGraw of the West Virginia Supreme Court of Appeals.
>
> With pained gospel tones playing in the background, silhouetted faces of children appear on the screen. A man's voice says, "We won't show you the faces of children, as young as 4, Tony Dean Arbaugh was convicted of sexually molesting. But we can identify the man who ordered him set free to work in a school full of kids he assaulted – Judge Warren McGraw."
>
> Canifeld played the commercial for his firm's office administrator, a woman he said had work with lawyers long enough to know how complex the law and its results can be.
>
> But her reaction was simple. Referring to the incumbent, she said, "That's outrageous that someone like that could be a judge."

> Canfield asked whether there was anything he could tell her that might change her opinion. She said he would have to show her that the ad was a complete lie and the case never happened.
>
> In judicial politics, however, answers are almost never that easy. If attacked as soft on crime in an effective way, said Canfield, a sitting judge can't defend herself.
>
> "It is a very emotionally powerful ad that would be almost impossible for anyone to respond to in a 30-second rebuttal," he said.

Alyson M. Palmer, *Tough race, tougher tactics, How Presiding Justice Carol Hunstein and her campaign advisors adopted what they feared most – the knockout ad*, Daily Rep. (Atlanta), Dec. 20, 2006, at 1, 8.

Those fears were realized. The Safety and Prosperity Coalition aired "commercials claiming Hunstein was a liberal who 'voted to throw out evidence that convicted a cocaine trafficker' and 'ignored extensive case law and over ruled a jury to free a savage rapist.' . . ." *Id.* at 8.

The Hunstein campaign had prepared a counterattack. It ran an ad asserting that Wiggins "was 'sued by his own mother for taking her money'" and that "Wiggins's sister said 'he threatened to kill her while she was eight months pregnant,' and that a judge ordered Wiggins never to have contact with her again." Jill Young Miller, *Justice's TV ad a hard hitter, Wiggins rebuts Hunstein attack*, Atlanta J. Const., Oct. 27, 2006, at D-1. When the ad began running, the Hunstein campaign "distributed to reporters documents to support the ad, including an affidavit by his sister in 1999. . . ." *Id.* The Wiggins campaign "condemn[ed] the ad

as 'the most cruel, false and personal attack aired in Georgia this campaign cycle.'" *Id.*

F. Outcome and future prospects

Hunstein prevailed in a landslide. She won in all 159 of Georgia's counties and got 63.1% of the vote statewide. Andy Peters and Alyson Palmer, *Hunstein win won't end challenges, some say*, Daily Rep. (Atlanta), Nov. 9, 2006, at 1.

But that does not mean there will be no similar challenges in the future. The head of "the American Justice Partnership, the business group that funneled more than $1.3 million to the Safety and Prosperity Coalition" said, "'This is sort of Georgia's first course' of the rough-and-tumble judicial politics seen around the country." Alyson M. Palmer, *Tough race, tougher tactics, how Presiding Justice Carol Hunstein and her campaign advisors adopted what they feared most – the knockout ad*, Daily Rep. (Atlanta), Dec. 20, 2006, at 8.

II. Analysis

Events in Georgia suggest that this Court underestimated the consequences of its decision in *White*. That decision has had a corrosive effect upon the integrity of the judiciary and the rule of law.

The outcome of the Wiggins/Hunstein race is no guarantee of the outcome of future "rough-and-tumble" judicial races. Justice Hunstein's victory is in part a product of the individual strengths and weaknesses of the two candidates. A portion of her strength is derived from the fact that she was a respected and long-serving member of the Georgia Supreme Court. Of course she achieved that status in the pre-*White* era.

Justice Hunstein is a member of a Supreme Court that, by its example and through its authority, leads a state judiciary comprised mostly of men and women who are committed to the ideal of impartiality. Before *White*, fealty to that ideal was an enforceable duty. Now Georgians who are working to preserve the impartiality of the state judiciary, including the members of this amicus, are shoring up a dam against a flood. So far the dam has held. But there is no end in sight to the flood of money from groups advancing particular agendas and the interests of particular classes of litigants, without regard for legal merits. If it continues indefinitely, there is little reason to doubt that the dam will eventually crack and fail.

The holding in *White* that impartiality is not a compelling state interest is founded on a tripartite analysis of the concept of impartiality. The opinion discusses impartiality as "the lack of bias for or against either *party* to the proceeding," as "the lack of preconception in favor of or against a particular *legal view*," and as "what might be described as open-mindedness." 536 U.S. at 775-779, 122 S. Ct. at 2535-2537 (emphasis in the original). The majority opinion acknowledges that bias for or against a party violates Due Process. 536 U.S. at 776, 122 S. Ct. at 2535. But the majority opinion holds that there is no Due Process right to a lack of predisposition as to legal views or to open-mindedness. 536 U.S. 777-779, 122 S. Ct. at 2536-2537.

Events in Georgia since *White* counsel reexamination of that tripartite analysis. That analysis did not fully account for the power and audacity of groups like the Safety and Prosperity Coalition. The sort of partiality the Safety and Prosperity Coalition tried to purchase by financing the Wiggins campaign does not fall neatly into any of the three categories analyzed in *White*: it partakes in some respects of bias as to parties and in some respects of bias as to legal views.

An editorial endorsing Justice Hunstein charged that the Safety and Prosperity Coalition was, "simply put, out to buy a seat on the state's highest court." Editorial, *Count on Hunstein, State Supreme Court justice's record is solid; voters must see through coalition's move to control seats*, Atlanta J. Const., Oct. 24, 2006, p. A-14. That objective was plainly on display in the Judicial Evaluation Institute survey. The survey was unashamedly result oriented. It evaluated the justices of the Supreme Court of Georgia as though they were a sales force, rating them on their production of decisions that advanced the goal of "restraining the spread of liability," with no regard whatsoever for the merits of legal issues. Andy Peters and Alyson M. Palmer, *Business lobby takes aim at three justices of high court*, Daily Rep. (Atlanta), June 20, 2006, at 1.

The holding of *White* is, in effect, that candidates for judicial office have a constitutional right to campaign in such a way as to demonstrate their unfitness for judicial office. Recognition of a robust Due Process right to recusal of judges who attained their offices by demonstrating partiality is an appropriate way to balance litigants' Due Process rights with judicial candidates' First Amendment rights.

CONCLUSION

This court should grant certiorari and should recognize a robust Due Process right to recusal of judges who attained their offices by demonstrating partiality.

Respectfully submitted,

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